Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

CALIFORNIA DEPARTMENT OF YOUTH AUTHORITY,
Petitioner,

v.

DOSSEY DOUGLAS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General of the State of California
PAMELA SMITH-STEWARD
Chief Assistant Attorney General
DAVID S. CHANEY
Senior Assistant Attorney General
DENNIS W. DAWSON
MIGUEL A. NERI
Supervising Deputy Attorneys General
*T. MICHELLE LAIRD
Deputy Attorney General
*Counsel of Record
110 West "A" Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2323
Fax: (619) 645-2581
Counsel for Petitioner

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QUESTIONS PRESENTED

1. Whether time-barred disability discrimination claims based on an express denial of employment for failure to meet a hiring standard are revived by the continuing violation doctrine where the plaintiff re-applies for the position during the limitations period and while the hiring standard is still in effect, but there is no application of the hiring standard to the plaintiff within the limitations period.

2. Whether the Ninth Circuit contradicted U.S. Supreme Court decisional authority, stating that collateral appeals of an employment decision do not serve to toll limitations periods, by concluding that the plaintiff's claims were timely under the continuing violation doctrine because he acted reasonably during the limitations period by pursuing collateral appeals of a denial of employment and re-applying for the position, rather than filing suit.

LIST OF PARTIES

Petitioner before this Court and appellee in the proceedings below is the California Department of Youth Authority.

Respondent before this Court and appellant in the proceedings below is Dossey Douglas.

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IN THE SUPREME COURT OF THE UNITED STATES

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DOSSEY DOUGLAS, *Respondent.*

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the order and opinion of the United States Court of Appeals for the Ninth Circuit entered on November 14, 2001 and amended on November 26, 2001. *Douglas v. California Department of Youth Authority*, 271 F.3d 812 (9th Cir. 2001).

OPINION OR JUDGMENT BELOW

The opinion of the Court of Appeals below is published at 271 F.3d 812 (9th Cir. 2001) and is reprinted in the Appendix at App. A-1 through App. A-21.

The Memorandum and Order of the United States District Court for the Eastern District of California (Shubb, Chief D.J.) and the corresponding Judgment, dated August 27, 1999, are reprinted at App. B-22 through App. B-37. The

transcript of the oral argument on August 23, 1999 before the United States District Court for the Eastern District of California (Shubb, Chief D.J.) is reprinted at App. C-38 though App. C-76.

STATEMENT OF JURISDICTION

Respondent filed a complaint in the United States District Court for the Eastern District of California, citing federal jurisdiction under 28 U.S.C. §§ 1331, 1343 and 1367, 29 U.S.C. § 794 and 42 U.S.C. § 2000e-5. Petitioner's motion for summary judgment was thereafter granted and Judgment was entered on August 27, 1999. On appeal by Respondent, the Ninth Circuit reversed and remanded the case to the district court on November 14, 2001 (amended November 26, 2001).

On January 7, 2002, the Ninth Circuit *sua sponte* ordered the parties to file briefs by January 28, 2002, addressing the question whether the Ninth Circuit should rehear the case *en banc*. Both parties filed the requested briefs by the deadline of January 28, 2002. On February 4, 2002, the U.S. Supreme Court granted Petitioner an extension of time to file a petition for writ of certiorari to and including April 13, 2002. The Supreme Court's February 4, 2002 Order is reprinted at App. D-77. In a published decision, the Ninth Circuit denied rehearing *en banc* on April 12, 2002.

The jurisdiction of this Court to review the judgment of the Ninth Circuit rests on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Respondent filed a complaint alleging disability discrimination under Title I of the Americans with Disabilities

Act, 42 U.S.C. § 12101, et seq. ("ADA") and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701, et seq. ("Section 504").

The statutes at issue concern the limitations periods for filing claims under the ADA and Section 504. The limitations period for bringing ADA claims is imposed by Section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e)(1), which reads, in pertinent part, as follows:

> A charge under this section shall be filed [with the Equal Employment Opportunity Commission ("EEOC")] within one hundred and eighty days after the alleged unlawful employment practice occurred ..., except [when] the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice ..., such charge shall be filed [with the EEOC] within three hundred days after the alleged unlawful employment practice occurred ....

Since there is no stated limitations period for bringing Section 504 claims, the limitations period for bringing such claims in California is borrowed from the California state statute of limitations for filing personal injury claims, California Code of Civil Procedure section 340(3), requiring an action to be filed:

> Within one year ... for injury to or for the death of one caused by the wrongful act or neglect of another ....

The substantive federal laws upon which the suit is based are Title I of the ADA and Section 504 of the

Rehabilitation Act of 1973. Title I of the ADA, 42 U.S.C. § 12112(a), reads, in pertinent part, as follows:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, provides, in pertinent part:

> No otherwise qualified individual with a disability in the United States, as defined in section 7(20) [of this title], shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance ....

STATEMENT OF THE CASE

Respondent Dossey Douglas completed an application in 1994 to participate in a written exam as the first step in the process to be hired as a "Group Supervisor" by Petitioner, the California Department of the Youth Authority ("CYA"). The Group Supervisor position is a peace officer classification within state civil service. Group Supervisors are responsible for the security and custody of youthful offenders within CYA correctional institutions. On March 1, 1996, CYA denied

employment to Respondent as a "Group Supervisor" and communicated its hiring decision, and the reason for it, to him in writing on that date. The express reason for the denial of employment was due to Respondent's inability to meet CYA's minimum color vision standards. Under CYA's hiring standards, evidence of a color vision deficiency (commonly referred to as "color blindness"), is a permissible basis upon which to reject an applicant for the Group Supervisor position. Group Supervisor applicants must demonstrate through post-employment-offer vision testing that they possess normal color vision or only a mild color vision deficiency to be eligible for appointment to the position.

Respondent sought reversal of CYA's hiring decision through the California State Personnel Board's ("SPB") appeals process and through CYA's internal discrimination complaint unit. These efforts failed to result in a reversal of CYA's hiring decision, and the SPB's decision denying Respondent's petition for rehearing before that body was issued on July 30, 1997.

On April 18, 1997, 413 days after Respondent was rejected for hire, he filed an EEOC charge of discrimination. In his EEOC charge, Respondent alleged:

> "I applied for a position as a Group Supervisor (Correctional Officer) in November 1994 and was rejected because of a disability. . . . "
> "I appealed the rejection. . . . "
> "I believe I have been discriminated against because of my disability."

On May 7, 1998, Respondent was issued a right-to-sue letter by the EEOC. On July 6, 1998, Respondent filed suit against CYA in the district court, alleging that he was

unlawfully denied employment in violation of the ADA and Section 504.

The district court granted summary judgment for CYA on the grounds that: (1) Respondent failed to file an administrative charge of discrimination with the Equal Employment Opportunity Commission within the requisite 300-day limitations period following his rejection for hire on March 1, 1996, as a prerequisite to filing suit under the ADA and; (2) Respondent failed to file a Rehabilitation Act claim in federal court within the requisite one-year limitations period following his rejection for hire on March 1, 1996. The district court specifically rejected Respondent's continuing violation theory based on the continued existence of the hiring standard. It also rejected Respondent's arguments that the continuing violation doctrine was triggered when he re-submitted a written application for the Group Supervisor position in late 1996 or when he made inquiries about whether the standard was in effect in late 1998, because Respondent failed to demonstrate any application of CYA's color vision standard to him within the applicable limitations period. Respondent appealed the summary judgment against him.

In a published decision, the Ninth Circuit reversed the judgment of the district court, holding that the continuing violation doctrine rendered Respondent's ADA and Section 504 claims timely -- even though Respondent was not rejected for hire by reason of the color vision standard after March 1, 1996 -- because: (1) he was "exposed" to the color vision standard during the limitations period when he re-submitted a written application for the Group Supervisor position in October, 1996, for the 1996-1998 window period for hiring; and, alternatively, (2) he acted reasonably during the limitations period by pursuing collateral avenues of appeal identified to him and by reapplying for the Group Supervisor position, rather than by filing a discrimination complaint in court or with the EEOC.

The Ninth Circuit applied the continuing violation doctrine to revive Respondent's time-barred March 1, 1996 denial of employment claim based on its identification of the case as one involving a "systemic discrimination policy," and by holding that "repeated efforts" by an applicant to gain employment "extends the accrual of the limitations period in such a case."[1/]

REASONS FOR GRANTING THE WRIT

I.

THE CIRCUMSTANCES BY WHICH THE CONTINUING VIOLATION DOCTRINE MAY EXTEND STATUTORILY-IMPOSED LIMITATION PERIODS IN EMPLOYMENT DISCRIMINATION CASES IS AN IMPORTANT FEDERAL QUESTION UPON WHICH CERTIORARI WAS GRANTED AND IS CURRENTLY PENDING IN THIS COURT

This Court has granted a writ of certiorari to review a decision of the U.S. Court of Appeals for the Ninth Circuit in *Morgan* v. *National Railroad Passenger Corp.*, 232 F.3d 1008 (9th Cir. 2000), *cert. granted*, 533 U.S. 927, (June 25, 2001)

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1. Until his opposition to petitioner's summary judgment motion, respondent had not alleged that he re-submitted a written application for the Group Supervisor position in the late 1996, nor did he contend that a "systemic policy of discrimination" was at issue in the case.

(No. 00-1614). The question certified for review in *Morgan* is whether the Ninth Circuit correctly held that a plaintiff who has knowingly allowed the statute of limitations to lapse on alleged violations of federal anti-discrimination statutes may nevertheless sue on such time-barred claims whenever incidents within the limitations period are "sufficiently related" to the otherwise time-barred claims.

The *Morgan* case concerns a question similar in principle to the first question presented by the instant Petition. In deciding *Morgan*, this Court will review and analyze the same statutes and legal precedents, such as those pertaining to rules of accrual, whether and when a discrete act of discrimination triggers the limitations period, and the application of the continuing violation doctrine to extend limitations periods, as it would if a writ of certiorari were granted in this case. Furthermore, the same public policy considerations are at stake in both cases, such as what level of enforcement of procedural requirements specified by the anti-discrimination statutes will afford predictable results for litigants in employment discrimination cases while effectuating the statutes' remedial purpose of eradicating discrimination.

Thus, the importance of the federal question presented herein and its need for explication has been acknowledged by this Court through its decision to grant a writ of certiorari in *Morgan*. This Court's decision in *Morgan* also has the potential to impact this case because of the similarity of the underlying legal issues presented for review.

II.

THE NINTH CIRCUIT'S DECISION CONFLICTS WITH SETTLED SUPREME COURT PRECEDENT CONCERNING THE APPLICATION OF LIMITATION PERIODS AND THE CONTINUING VIOLATION DOCTRINE IN EMPLOYMENT DISCRIMINATION CASES

The Ninth Circuit's decision is in conflict with settled Supreme Court precedent holding that, for purposes of determining the date on which the limitation period accrues in a discrimination case, the relevant date is when the individual is aware of the unlawful acts causing the injury. *Bazemore v. Friday*, 478 U.S. 385 (1986); *Chardon v. Fernandez*, 454 U.S. 6 (1981); *Delaware State College v. Ricks*, 449 U.S. 250 (1980). In this case, Respondent alleged that he was discriminated against when CYA rejected him for the position of Group Supervisor because he failed to meet its color vision standard. This discrete event occurred and was communicated to Respondent on a date certain, March 1, 1996, and on no other date. Nonetheless, the Ninth Circuit disagreed with the district court's finding that Respondent's claims for discriminatory denial of employment accrued on that date and that, therefore, his late-filed claims were time-barred. The Ninth Circuit applied the continuing violation doctrine to revive the time-barred claims based on Respondent's submission of a new application for the position while the hiring standard was in effect and during a window period for hiring that extended from 1996 through 1998 and, thus, into the limitations period. The Ninth Circuit reached this conclusion although the hiring standard was not enforced to deny Respondent employment within the limitations period. The application of the continuing violation doctrine by the Ninth Circuit in this manner cannot be

reconciled with U.S. Supreme Court precedent as set forth in *Bazemore,* 478 U.S. 385, *Ricks*, 449 U.S. 250, and *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977). *See also, Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989); and, *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

A case that should have involved the straightforward application of settled law to simple facts involving a discrete failure to hire was utilized by the Ninth Circuit to expand the continuing violation doctrine to make actionable time-barred claims where no act of discrimination was alleged to have occurred within the limitations period. This case is an appropriate one for a grant of certiorari because there is a need for a national standard regarding the application of rules of accrual and the continuing violation doctrine in employment discrimination cases.

A. In Applying The Statute Of Limitations In A Discrimination Case, The Proper Focus Is On The Time That The Alleged Discriminatory Act Occurred, And The Continuing Violation Doctrine Is Inapplicable Where The Plaintiff Fails To Identify Any Discriminatory Act Occurring Within The Limitations Period

It is well-settled that for purposes of determining the date on which the limitation period begins to run in a discrimination case, the relevant date is when the individual is aware of or should be aware of the unlawful acts that caused the injury. *Chardon*, 454 U.S. at 8; *Ricks*, 449 U.S. at 258. Once the limitations period begins to run, a plaintiff has, in most cases, 300 days to file a charge of discrimination with the EEOC as a prerequisite to bringing suit under federal anti-discrimination statutes such as Title VII and the ADA, 42 U.S.C. § 2000e-5(e), and, in California, one-year to file suit

under the Rehabilitation Act. CAL. CIV. PROC. CODE § 340(3) (West 1999).

Although nothing precludes the application of the traditional continuing violation doctrine to discrimination cases, that doctrine provides that only successive unlawful acts may reset the date on which the limitations period begins to run. *Zenith Radio v. Hazeltine Research*, 401 U.S. 321, 338-39 (1971). Consistent with the traditional doctrine, this Court rejects its application in discrimination cases where the plaintiff fails to identify one or more discriminatory acts occurring within the limitations period.

In *Ricks*, 449 U.S. 250, this Court first had to "identify precisely the 'unlawful employment practice' of which [Ricks] complains" to determine the timeliness of his EEOC complaint. *Id.* at 257. Ricks alleged that he was denied tenure because of his national origin. *Id.* at 252. Ricks' complaint was held time-barred because he did not file an EEOC complaint within the requisite time period after the tenure decision was made known to him. *Id.* at 261, n.13; *Accord*, *Chardon*, 454 U.S. at 8. In rejecting application of the continuing violation doctrine based on Ricks' continued employment with the college after the denial of tenure, this Court noted that "the only alleged discrimination occurred ... at the time the tenure decision was made and communicated to Ricks." *Ricks*, 449 U.S. at 258. In rejecting Ricks' continuing violation argument, this Court explicitly noted his failure to allege the occurrence of discriminatory acts within the limitations period in his complaint. *Id.* at 504.

In support of its holding in *Ricks*, this Court relied upon an earlier decision, *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977). In *Evans*, the plaintiff was forced to resign as a flight attendant when she married in 1968 under her employer's then-current policy of refusing to allow its female

flight attendants to be married. *Id.* at 554. After her employer's policy changed, Evans sought reinstatement on several occasions but was unsuccessful. *Id.* at 555. After she was rehired as a new employee in 1972, she filed discrimination charges alleging that her employer's seniority system was discriminatory because it failed to credit her for her prior service. *Id.* at 555-556.

This Court noted that, although the resignation-upon-marriage policy had been determined in another case to be violative of Title VII, the *Evans* plaintiff was not a party to that case and she did not initiate any proceedings of her own either within the limitations period following her 1968 forced-resignation or following her employer's act of failing to reinstate her seniority credit upon her rehire. *Id.* at 554-555. Thus, the Court held, these claims were time-barred. *Id.* at 554-555.

In an effort to save her claim, the *Evans* plaintiff alleged that her employer's seniority system gave present effect to a past act of discrimination and that it therefore constituted a continuing violation based on the continuing impact of her employer's resignation-upon-marriage policy on her current seniority status. *Id.* at 578. The Court rejected this theory, stating that the employer:

> ...was entitled to treat that past act as lawful after [Evans] failed to file a [timely] charge of discrimination .... A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately

> considered, it is merely an unfortunate event in history which has no present legal consequences. Id. at 578.

Thus, in *Evans*, this Court focused on the alleged unlawful acts by the employer (i.e. forcing Evans to resign and failing to credit her seniority status upon her rehire), and on whether those acts occurred within the limitations period to determine whether the plaintiff presented a timely claim, rather than focusing on the more ephemeral "present effects" concept. As such, the Court rejected any application of the continuing violation doctrine to save the plaintiff's time-barred claims based on the continuing status of the plaintiff within the seniority system.

Similarly, in a housing discrimination case, this Court dismissed the claims of one of several plaintiffs as untimely where she failed to allege the occurrence of discriminatory acts against her within the limitations period. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380-381 (1982). In so doing, the Court reversed the decision of an appellate court that had allowed her to proceed on a continuing violation theory. *Id.* at 380-381. In *Havens*, other plaintiffs' claims were permitted to go forward, but only because they filed their complaints within the 180-day limitation period following the last asserted occurrence of an alleged unlawful practice by the landlord. *Id.* at 380-381. *Havens* thus affirms this Court's view that unless an asserted act of discrimination occurs within the limitations period, the continuing violation doctrine is entirely inapplicable.

This Court has applied the continuing violation doctrine to extend limitations periods under limited circumstances. For example, where an employer paid less salary to black employees than to similarly-situated white employees, this Court held that the suit was timely-filed even

though the salary structure was initiated outside the limitations period because each time a paycheck delivered a lesser salary to a black employee than to a white employee, a discriminatory act occurred. *Bazemore*, 478 U.S. at 395-396.

Likewise, in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 912, n.5 (1989), this Court noted that a facially discriminatory policy can be challenged even years after its inception because it "discriminates each time it is applied," in recognition that it is the employer's application of that policy that constitutes the unlawful act.[2/]

The circumstances that called for the application of the continuing violation doctrine in *Bazemore* and *Lorance* cannot be reconciled with those present here. This case does not involve ongoing discrimination but, rather, it involves a discrete decision on March 1, 1996, to deny the plaintiff employment based on his inability to meet a minimum qualification for the job. Thus, the *Evans, Ricks* and *Havens Realty* line of cases control. Respondent's awareness of his rejection for hire because of his failure to meet CYA's hiring standard triggered his duty to assert his rights under the federal anti-discrimination laws. Thus, when Respondent failed to timely file his claims, CYA's March 1, 1996 hiring decision became the legal equivalent of a discriminatory act which occurred before the ADA or Rehabilitation Act were passed.

The Ninth Circuit's decision essentially creates an open-ended statute of limitations for applicants who fail to meet

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2. Congress narrowed the ruling in *Lorance* to allow challenges to facially neutral seniority systems at any time after their adoption, but did not otherwise alter the court's rulings that the statute of limitations runs from the date of an occurrence of an unlawful act.

stated minimum hiring standards. This Court has explained the rationale behind statutes of limitations as follows:

> Statutes of limitations, which 'are found and approved in all systems of enlightened jurisprudence,' [citation], represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.' [Citation.] These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise. [Citations.] *United States v. Kubrick*, 444 U.S. 111, 117 (1979).

The resulting effect of the decision below is that applicants who have been denied employment in the past may revive time-barred claims merely by re-submitting a written application for the same position on a future date, so long as the hiring standard is still in effect. Further, it allows the plaintiff to dictate when the statute accrues and leaves employers potentially vulnerable to suit years after employment decisions are made. This is contrary to the policy rationale behind statutes of limitation, which is to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights.

III.

THE NINTH CIRCUIT HAS CREATED NEW GROUNDS FOR TOLLING THE STATUTORY LIMITATIONS PERIOD

In an alternative holding, the court of appeals stated that, even if it applied a strict notice requirement to the facts, it would find that the continuing violation doctrine saved Respondent's claims because "we cannot say that Douglas acted unreasonably by pursuing each avenue of appeal identified to him, and by reapplying for the position." *Douglas v. California Department of Youth Authority*, 271 F.3d at 824, n.13, *citing*, *Galloway v. General Motors Serv. Parts Operations*, 78 F.3d 1164, 1167 (7th Cir. 1996); App. A-20 through App. A-21. The "avenue of appeal" referred to by the court was CYA's internal discrimination unit and the California State Personnel Board. It is undisputed that Respondent appealed to these entities in an effort to obtain a direct reversal of CYA's March 1, 1996 hiring decision.

The Ninth Circuit's alternative holding is essentially the impermissible "tolling" of the limitations period during the pursuit of administrative appeals which has been expressly disapproved of by this Court. *Ricks*, 449 U.S. at 261. In *Ricks*, the plaintiff argued that his pursuit of a grievance regarding the employment decision at issue tolled the limitations period such that his claims did not actually accrue until he was notified of the unfavorable results of the grievance. This Court disagreed, stating:

> [t]he grievance procedure, by its nature, is a remedy for a prior decision, not an opportunity to influence that decision before it is made. . . . . the pendency of a

> grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations period. *Id.* at 261, *citing*, *Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976).

Thus, the period within which Ricks should have filed his claims having passed, this Court held that his 42 U.S.C. § 1981 and Title VII employment discrimination claims were time-barred. *Id.* at 262. Apparent in the Court's decision was its recognition of the deference to be paid federally enacted limitation periods and to the concept that limitation periods normally commence when the employer's decision is made. *Id.* at 256-257, 259; 42 U.S.C. § 2000e-5(e).

In this case, the court of appeals utterly failed to consider *Ricks*. Its alternate holding, that the continuing violation doctrine revived Respondent's late claims under the "reasonableness" test espoused in *Galloway*, was no more than an exercise in specious reasoning.[3/] Under the facts, the holding

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3. *Galloway* concerned a pattern of harassing conduct over time, where the time-barred conduct was recognized as actionable only in light of the conduct occurring within the limitations period. *Galloway*, 78 F.3d at 1167-1168. The "reasonableness" factor discussed in *Galloway* concerns the question of whether and when, under the circumstances, it is reasonable to expect a plaintiff to recognize that he is a victim of actionable injury. *Id.* at 1166-1168. Here, Respondent did not allege a pattern of harassing conduct over time. To the contrary, he alleged a discrete hiring decision communicated to him on a date certain. The fact that Respondent re-applied for the position has no analytical counterpart in *Galloway* which would require a different result from *Ricks*.

in *Ricks* controls and, if it had been followed by the Ninth Circuit, should have resulted in a finding that Respondent's pursuit of collateral methods of review of Petitioner's decision to deny him employment did not extend the limitations period. The Ninth Circuit's holding subverts *Ricks* and re-opens the door for the extension of limitation periods based on the pendency of administrative appeals, a limitations-avoiding tactic already disapproved-of by this Court.

CONCLUSION

For the reasons stated, the petition for certiorari should be granted.

Dated: April 12, 2002

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

PAMELA SMITH-STEWARD
Chief Assistant Attorney General

DAVID S. CHANEY
Senior Assistant Attorney General

DENNIS W. DAWSON
MIGUEL A. NERI
Supervising Deputy Attorney General

T. Michelle Laird

*T. MICHELLE LAIRD
Deputy Attorney General
*Counsel of Record

Counsel for Petitioner

TML:tlg
SA1998CV1060

(2) 01-1546

No.

IN THE SUPREME COURT OF THE UNITED STATES

CALIFORNIA DEPARTMENT OF YOUTH AUTHORITY,
Petitioner,

v.

DOSSEY DOUGLAS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General of the State of California
PAMELA SMITH-STEWARD
Chief Assistant Attorney General
DAVID S. CHANEY
Senior Assistant Attorney General
DENNIS W. DAWSON
MIGUEL A. NERI
Supervising Deputy Attorneys General
*T. MICHELLE LAIRD
Deputy Attorney General
*Counsel of Record
110 West "A" Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2323
Fax: (619) 645-2581
Counsel for Petitioner

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Eastern District of California C-38

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United States Court of Appeals
For the Ninth Circuit

Dossey DOUGLAS, Plaintiff-Appellant,
v.
CALIFORNIA DEPARTMENT OF YOUTH AUTHORITY, Defendant-Appellee.

No. 99-17140.

Argued and Submitted
June 4, 2001- San Francisco, California

Filed November 14, 2001
Amended November 26, 2001

Appeal from the United States District Court for the Eastern District of California;
William B. Shubb, District Judge, Presiding.
D.C. No. CV 98- 01281-WBS/PAN.

Before: PREGERSON, FERGUSON, and HAWKINS, Circuit Judges.

PREGERSON, Circuit Judge:

Dossey Douglas ("Douglas") was denied employment by the California Youth Authority ("CYA") because a vision test indicated that he was color-blind. Douglas brought suit against CYA for its failure to hire him under Title I of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12112(a), and Section 504 of the Rehabilitation Act ("Section 504"), 29 U.S.C. § 794. The district court granted summary judgment to CYA on the ground that Douglas's claims are barred by the applicable statutes of limitations. Douglas argues on appeal that

his claims are timely under the continuing violations doctrine because the CYA's discriminatory policy was on-going. Alternatively, Douglas argues that his failure to comply with the statutes of limitations should be excused under the doctrines of equitable tolling or equitable estoppel. On appeal, CYA argues for the first time that the Eleventh Amendment is a defense to both claims.

With respect to Douglas's ADA claim, we remand the claim to the district court to determine whether CYA waived its sovereign immunity defense in this case. With respect to Douglas's Section 504 claim, we conclude that California waived its sovereign immunity defense by accepting federal Rehabilitation Act funds. Because we determine that Douglas's claims are timely under the continuing violations doctrine, we do not reach Douglas's equitable tolling or estoppel arguments.

I.

Douglas, an African-American, first applied for a position as a Group Supervisor with the defendant, CYA, in 1994. Douglas served as an air traffic controller in the United States Navy at the Alameda Naval Air Station. As an air traffic controller, Douglas interpreted colored lights on panels, screens, and related instruments, despite his color vision deficiency. Douglas was honorably discharged from the Navy after twelve years of service. He moved from the Bay Area to Sacramento and began looking for work in the Sacramento area.

In the fall of 1994, Douglas learned that CYA was accepting applications for the position of Group Supervisor, a job that entails supervising youthful offenders in CYA facilities.

The screening process for applicants involves a written examination, oral interviews, a background check, and a

physical examination. CYA administers the written examination in the fall of every other year and keeps the applications on file between examination periods.

Douglas took and passed the written examination for the position in November 1994. Over the following year and a half, Douglas passed the other screening tests. In March of 1995, CYA notified Douglas that he was ranked fourth on the eligibility list for hiring. Three months later, CYA adopted for the first time a color vision standard for the position of Group Supervisor. CYA notified Douglas of the new color vision standard by letter on June 1, 1995. On January 18, 1996, CYA offered Douglas a position at its DeWitt Facility, conditioned on his passing additional medical tests, including a vision test.

One week later, CYA tested Douglas's vision. CYA notified Douglas on February 1, 1996 that he had failed the color vision test. CYA informed Douglas that he could pay for an additional vision test at his own expense (a "Farnsworth D-15" test), and that if he passed the second test he would be hired. Douglas sought a private doctor, Dr. Shinfuku, who administered the Farnsworth D-15 test to Douglas on February 5, 1996. Dr. Shinfuku determined that Douglas had a "moderate" color vision deficiency. The Chief Medical Officer of CYA reviewed Dr. Shinfuku's results and concluded that Douglas failed the Farnsworth D-15 test. CYA notified Douglas on March 1, 1996 that he failed the vision test, and that he could appeal to the State Personnel Board within thirty days.

At Douglas's request, Dr. Shinfuku reviewed the CYA job posting, which specified that persons with mild to moderate color vision deficiencies would be eligible for the Group Supervisor position. Dr. Shinfuku wrote a letter to CYA stating that Douglas was qualified under this standard. A second doctor tested Douglas and also concluded that Douglas had a "moderate" color vision deficiency.

On March 24, 1996, Douglas went to the CYA "Equal Opportunity Office" ("EEO") and met with an Equal Opportunity Technician. In response to Douglas's question about available avenues for appeal, the officer explained to Douglas that he could file a complaint with the EEO, and appeal to the California State Personnel Board. The officer did not instruct Douglas to file an appeal with the federal Equal Employment Opportunity Commission ("EEOC")--or explain that the EEO was different from the EEOC.

In late March of 1996, Douglas submitted a complaint to the EEO office and appealed CYA's decision to the State Personnel Board. On May 2, 1996, Douglas's discrimination charge filed with the EEO office was denied. While awaiting the results of the State Personnel Board's decision, Douglas re-tested for the position of Group Supervisor in the fall of 1996. The State Personnel Board notified Douglas on February 27, 1997 that his appeal was denied and informed him for the first time of his right to file an action in state or federal court, or to file a discrimination charge with the EEOC or California Fair Employment and Housing Department ("CFEH"). Throughout 1996 and 1997, Douglas was unrepresented by counsel.

Douglas filed a discrimination charge with the federal EEOC on April 9, 1997. On February 23, 1998, the EEOC issued a "cause finding," based on its determination that the CYA color vision requirement for the Group Supervisor position violated the ADA. Douglas filed suit in federal court in July 1998, alleging violations of Title I of the ADA and Section

504 of the Rehabilitation Act of 1973.[1] Douglas sought money damages and injunctive relief.[2]

CYA moved for summary judgment on the grounds that Douglas's ADA claim was barred for failure to timely exhaust his administrative remedies, and that his Rehabilitation Act claim was filed after the statute of limitations had expired. Douglas defended against summary judgment by arguing that both his ADA and Rehabilitation Act claims were filed timely under a continuing violations theory. Douglas also argued that if the court found the Rehabilitation Act claim untimely, it

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1. Title I of the ADA provides: "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). Section 504 of the Rehabilitation Act similarly provides: "No otherwise qualified individual with a disability in the United States [defined elsewhere] shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service." 29 U.S.C. § 794(a).

2. In the fall of 1998, after filing suit, Douglas learned that the CYA was testing again for the Group Supervisor position. Douglas asked numerous CYA personnel members if passing the color vision test was still a requirement. He learned that the policy remained in effect. He was also told by a Senior Group Supervisor that to be hired he would need to pass the Farnsworth D-15 color vision test. Based on this information, Douglas did not apply for the 1998 examination.

should apply equitable tolling or estoppel to save the claim. On August 27, 1999, the district court rejected each of these theories and granted summary judgment to CYA on both the ADA and Rehabilitation Act claims. Douglas timely appealed.

II.

Before addressing the timeliness of Douglas's claims, we first consider California's new argument that it is protected from suit in federal court by the Eleventh Amendment. California relies upon the Supreme Court's recent decision in *Board of Trustees of the Univ. of Ala. v. Garrett,* 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001). In *Garrett,* the Supreme Court held that ADA Title I claims against states for money damages are barred by the Eleventh Amendment. *Id.* at 968. Although *Garrett* was decided in February, 2001, California waited until May 21, 2001, two weeks before oral argument was scheduled, to notify the court of *Garrett* and assert the Eleventh Amendment defense. We ordered supplemental briefing to address the impact of *Garrett* on the instant case.

A.

States are protected by the Eleventh Amendment from suits brought by citizens in federal court. *Hans v. Louisiana,* 134 U.S. 1, 15, 10 S.Ct. 504, 33 L.Ed. 842 (1890); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.,* 527 U.S. 666, 669, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999). There are only three exceptions to this general rule. First, a state may waive its Eleventh Amendment defense. *College Sav. Bank,* 527 U.S. at 670, 119 S.Ct. 2219, (citing *Clark v. Barnard,* 108 U.S. 436, 447-48, 2 S.Ct. 878, 27 L.Ed. 780 (1883)). Second, Congress may abrogate the States' sovereign immunity by acting pursuant to a grant of constitutional authority. *Kimel v. Florida Board of Regents,* 528 U.S. 62, 80, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000). Third, under the *Ex parte Young* doctrine, the Eleventh Amendment does not bar a "suit against a state

official when that suit seeks ... prospective injunctive relief." *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 73, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996).

The central question in *Garrett* was whether Congress validly abrogated the states' Eleventh Amendment immunity under Title I the ADA. 121 S.Ct. at 961. In recent years, the Supreme Court has imposed a two-part inquiry for determining whether Congress acts within its powers when it attempts to abrogate the states' Eleventh Amendment immunity. *See Seminole Tribe,* 517 U.S. at 55, 116 S.Ct. 1114. First, courts must ask "whether Congress unequivocally expressed its intent to abrogate" the states' immunity in the legislation itself. *Kimel,* 528 U.S. at 73, 120 S.Ct. 631. If the answer to this first inquiry is yes, then courts must next ask "whether Congress acted pursuant to a valid grant of constitutional authority." *Id.*

Congress acts pursuant to a valid grant of constitutional authority under § 5 of the Fourteenth Amendment when it enacts legislation with a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* (citing *City of Boerne v. Flores,* 521 U.S. 507, 520, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997)). This "congruence and proportionality" test requires Congress to identify and document the Fourteenth Amendment historical wrong that it seeks to remedy. Congress then must enact a statute that is proportional to its remedial goal. *See Florida Prepaid Postsecondary Ed. Expense Bd. v. Coll. Sav. Bank,* 527 U.S. 627, 639-40, 119 S.Ct. 2199, 144 L.Ed.2d 575 (1999); *City of Boerne,* 521 U.S. at 525, 531, 117 S.Ct. 2157.

At the time the instant case was pending before the district court, the circuit courts were divided over whether Congress validly exercised its power under § 5 of the Fourteenth Amendment by authorizing suits against the states under the ADA. *Compare Dare v. State of Calif.,* 191 F.3d 1167, 1175

(9th Cir.1999) (holding that the ADA was a "congruent and proportional" response to disability discrimination by state governments), and *Muller v. Costello,* 187 F.3d 298, 308-09 (2d Cir.1999) (same), *with Alsbrook v. City of Maumelle,* 184 F.3d 999, 1007 (8th Cir.1999) (en banc) (holding that the ADA was not a valid exercise of Congress's power under § 5 of the Fourteenth Amendment).

In *Garrett,* the Supreme Court held that claims brought under Title I of the ADA against states for money damages are barred by the Eleventh Amendment. *Garrett,* 121 S.Ct. at 968. The Supreme Court concluded that although Congress unequivocally expressed its intent that the ADA would abrogate a state's Eleventh Amendment immunity, Congress acted outside of the scope of its § 5 powers under the Fourteenth Amendment because the ADA failed the "congruent and proportionality test." *Id.* at 967-68. The Court found that Congress failed to document sufficient evidence of a pattern of irrational state discrimination against people with disabilities in state employment. *Id.* at 965 (criticizing the lengthy congressional record documenting discrimination as anecdotal and overly broad). The Court also found that the "rights and remedies created by the ADA" were not "proportional and congruent" to the problem of employment discrimination against persons with disabilities. *Id.* at 966.

In light of *Garrett,* California argues that Douglas's claims for damages under Section 504 of the Rehabilitation Act and Title I of the ADA are barred by the Eleventh Amendment. We address each of these arguments in turn.

B.

Douglas contends that his Rehabilitation Act claim survives *Garrett* because California has waived its sovereign immunity by accepting Rehabilitation Act funds. We agree.

In *Clark v. State of California,* 123 F.3d 1267, 1271 (9th Cir.1997), we held that states are subject to suit in federal court under the Rehabilitation Act if they accepted federal Rehabilitation Act funds. In so holding, we relied upon the Supreme Court's instruction in *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 247, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985), that a state may waive its immunity by "accept[ing] federal funds where the funding statute 'manifests a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity.' " *Clark,* 123 F.3d at 1271 (quoting *Scanlon,* 473 U.S. at 247, 105 S.Ct. 3142). Based on the clear waiver set forth in the Rehabilitation Act,[3/] we concluded that by accepting federal Rehabilitation Act funds, the state waived its Eleventh Amendment immunity. *Id.*

Other circuits have reached the same conclusion. In *Jim C. v. United States,* 235 F.3d 1079 (8th Cir.2000) (en banc), the Eight Circuit en banc reasoned that Section 504's explicit waiver of sovereign immunity is a valid exercise of Congress's spending power and held that by accepting federal Rehabilitation Act funds, states waive their immunity with regard to this section. *Id.* at 1080. The Fourth Circuit referred to the Rehabilitation Act as the classic example of Congress conditioning a state's receipt of federal funding on acceptance of a state's waiver of sovereign immunity. *See Bell Atlantic Maryland, Inc. v. MCI Worldcom, Inc.,* 240 F.3d 279, 292 (4th Cir.2001) ("[A]ny State reading [the Rehabilitation Act's explicit waiver of sovereign immunity] would clearly understand that, by accepting Title IX funding, it was

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3. "A State shall not be immune under the Eleventh Amendment ... from any suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973." *Id.* at 1271 (quoting 42 U.S.C. § 2000d- 7).

consenting to resolve disputes regarding alleged violations of the Act's anti-discrimination provisions in federal court."). *See also Stanley v. Litscher,* 213 F.3d 340, 344 (7th Cir.2000) ("the Rehabilitation Act is enforceable in federal court against recipients of federal largess"); *Sandoval v. Hagan,* 197 F.3d 484, 493 (11th Cir.1999) (describing the Rehabilitation Act's waiver as a "clear" waiver of state sovereign immunity in exchange for federal funds), *overruled on other grounds, Alexander v. Sandoval,* 531 U.S. 1049, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001).[4]

Our decision in *Clark*--that a state was not immune to suit under the Rehabilitation Act--alternatively rested on our conclusion that Congress, acting pursuant to its powers under § 5 of the Fourteenth Amendment, abrogated the states' Eleventh Amendment immunity with regard to the Rehabilitation Act. *Clark,* 123 F.3d at 1271. This alternative holding is of questionable validity in light of *Garrett*'s determination that Congress acted outside of its powers by attempting to abrogate the states' Eleventh Amendment immunity in enacting the ADA. *See Clark,* 123 F.3d at 1270 ("[T]he purpose of both the ADA and section 504 of the Rehabilitation Act is to prohibit discrimination against the disabled."). CYA argues strenuously that *Garrett* requires us to overrule *Clark* 's holding that Congress validly abrogated the states' immunity under the Rehabilitation Act. CYA, however, does not challenge the validity, in light of *Garrett,* of our alternative holding in *Clark* that by accepting federal Rehabilitation Act funds a state waives its Eleventh Amendment immunity with regard to the Rehabilitation Act. If we conclude that California waived its

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4. The Supreme Court in *Sandoval* only considered the question whether Title VI includes a private right of action to enforce disparate- impact violations. The Court did not address the Eleventh Amendment issue.

sovereign immunity by accepting Federal Rehabilitation Act funds, we need not reach the question whether Congress validly abrogated the states' sovereign immunity under the Rehabilitation Act.

The majority of district courts which have decided cases after *Garrett* have held that the Eleventh Amendment does not protect states that accept federal Rehabilitation Act funds from suit under the Rehabilitation Act in federal court. *See Patricia N. v. Lemahieu,* 141 F.Supp.2d 1243, 1250 (D.Haw.2001) (following the conclusion in *Dare* and *Clark* that Rehabilitation Act claims are not barred by the Eleventh Amendment); *Frederick L. v. Dept. of Public Welfare,* 157 F.Supp.2d 509, 523 (E.D.Pa.2001) ("[T]he Eleventh Amendment is not a bar to suit in federal court for violations of section 504 [of the Rehabilitation Act]."); *Maull v. Division of State Police, Dept. of Public Safety, State of Del.,* 141 F.Supp.2d 463, 472 (D.Del.2001) ("declin[ing] to apply *Garrett* to Plaintiff's claim under the Rehabilitation Act"); *Boudreau ex rel. Boudreau v. Ryan,* No. 00 C 5392, 2001 WL 840583, *2 (N.D.Ill. May 2, 2001) ("[T]he Eleventh Amendment does not bar the plaintiffs' Rehabilitation Act claim."); *but see Pugliese v. Arizona Dept. of Health and Human Services,* 147 F.Supp.2d 985, 991 (D.Ariz.2001) (holding that Arizona did not waive its immunity under the Rehabilitation Act by accepting federal Rehabilitation Act funds).[5/]

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5. The only district court to rule that acceptance of federal Rehabilitation Act funds does *not* waive immunity under the Act relied not upon *Garrett,* but upon the Supreme Court's decision in *College Sav. Bank. Pugliese,* 147 F.Supp.2d at 990. Such reliance is misplaced. In *College Sav. Bank,* the Supreme Court revisited the doctrine of constructive waiver as cast in *Parden v. Terminal Ry. of Alabama State Docks Dept.,* 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964). In *Parden,* the

Accordingly, we hold that by accepting federal Rehabilitation Act funds, California has waived its sovereign immunity under the Rehabilitation Act. We adhere to our decision in *Clark* and conclude that the clear waiver language of the Rehabilitation Act conditions the receipt of federal funds

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Court held that although the Federal Employers Liability Act ("FELA") did not expressly condition participation in an interstate commerce activity upon waiver of immunity under FELA, a state constructively waived its sovereign immunity defense by operating a railroad in interstate commerce. *College Sav. Bank,* 527 U.S. at 677, 119 S.Ct. 2219 (citing *Parden,* at 192, 84 S.Ct. 1207) ("By enacting [FELA] ... Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act.").

In *College Sav. Bank,* the Supreme Court overruled the constructive waiver doctrine in the *Parden* context. *Id.* at 680, 119 S.Ct. 2219. While refusing to recognize waivers implied from participation of a state in a federal program, the Supreme Court carefully distinguished the "fundamentally different" case of constructive waivers implied from a state's acceptance of federal funds. *Id.* at 686, 119 S.Ct. 2219. "Conditions attached to a state's receipt of federal funds are simply not analogous to *Parden*-style conditions attached to a State's decision to engage in otherwise lawful commercial activity." *Id.* at 678 n. 2, 119 S.Ct. 2219. *College Sav. Bank* stands as a clear reaffirmation that Congress may exercise its spending power to condition the grant of federal funds upon the states' agreement to waive Eleventh Amendment immunity. *Id.* at 686, 119 S.Ct. 2219; *accord Jim C.,* 235 F.3d at 1081 (*citing College Sav. Bank,* 527 U.S. at 686, 119 S.Ct. 2219) ("Specifically, Congress may require a waiver of state sovereign immunity as a condition for receiving federal funds, even though Congress could not order the waiver directly.").

under the Rehabilitation Act upon a state's agreement to forgo the Eleventh Amendment defense. We therefore conclude that Douglas's Rehabilitation Act claim is not barred by the Eleventh Amendment.

C.

After *Garrett,* it is clear that states are immune from suits for money damages under Title I of the ADA. *Garrett,* 121 S.Ct. at 968, 121 S.Ct. 955. The only remaining question concerning the viability of Douglas's ADA claim is whether California waived its sovereign immunity in this case.[6] Although a waiver of Eleventh Amendment immunity must be unambiguous, a state may implicitly waive its sovereign immunity "by conduct that is incompatible with an intent to preserve that immunity." *Hill v. Blind Indus. and Servs. of Maryland,* 179 F.3d 754, 758 (9th Cir.1999), *amended by* 201 F.3d 1186 (9th Cir.2000); *see also Amanda J. ex rel. Annette J. v. Clark County School District,* No. 00-17157, 2001 WL 902125, *16 n.7 (9th Cir. Aug.13, 2001) (holding, in a case similarly briefed before *Garrett,* but decided after *Garrett,* that "both parties waived any rights they may have had to invoke the Eleventh Amendment defense of sovereign immunity by their extensive participation in this litigation").

As noted above, CYA did not raise the Eleventh Amendment defense before the district court, nor did it raise the defense in its appellate brief to this court. *Cf. Demshki v. Monteith,* 255 F.3d 986, 989 (9th Cir.2001) (finding that California preserved its immunity defense by raising the

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6. Because Douglas has not named a state official as a defendant in this suit, the *Ex parte Young* doctrine does not apply. *See Ex parte Young,* 209 U.S. 123, 159-60, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

Eleventh Amendment in its answer before *Garrett* was decided). Douglas argues that CYA was aware of the sovereign immunity defense under the Eleventh Amendment, but elected not to raise it. Whether CYA waived the immunity defense below by its conduct may conceivably be resolved on the basis of further factfinding.[7] Because the issue was not raised before the district court, we do not have the benefit of a factual record. Rather than evaluate the waiver argument in the absence of a record, we remand the issue to the district court.[8] *Cf. Katz v. Regents of the Univ. of Calif.*, 229 F.3d 831, 834 (9th Cir.2000) (finding that California waived its immunity to suit by not raising the defense before the district court and submitting a declaration of counsel which purports to waive the State's immunity). We note that on remand, CYA, as the "entity invoking the Eleventh Amendment immunity, bears the burden of asserting and proving those matters necessary to establish its defense." *In re Lazar*, 237 F.3d 967, 974 (9th Cir. 2001) (quoting *Hill*, 201 F.3d at 1186).

III.

The district court granted summary judgment to CYA on the ground that both the ADA and Rehabilitation Act claims

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7. Douglas maintains that the Deputy Attorney General told his trial counsel that he was instructed not to raise the Eleventh Amendment immunity defense in suits under the ADA. This allegation is not part of an evidentiary record.

8. Because the Eleventh Amendment is more appropriately considered an affirmative defense than a jurisdictional bar, we consider the merits of Douglas's argument that his ADA claim was timely. *See Hill*, 179 F.3d at 760 ("[T]he Eleventh Amendment is not a true limitation upon the court's subject matter jurisdiction, but rather a personal privilege that a state may waive.").

were time barred. Douglas contends that both claims are timely under the continuing violations doctrine. The continuing violations doctrine extends the accrual of a claim if a continuing system of discrimination violates an individual's rights "up to a point in time that falls within the applicable limitations period." *Williams v. Owens-Illinois, Inc.,* 665 F.2d 918, 924 (9th Cir.1982). We review de novo the district court's grant of summary judgment and consider the evidence in the light most favorable to the non-moving party. *Lopez v. Smith,* 203 F.3d 1122, 1131 (9th Cir.2000) (en banc). To survive summary judgment, Douglas need only demonstrate that genuine issues of material fact exist as to whether the continuing violations doctrine applies and CYA's discriminatory vision policy extended into the relevant period. *See Draper v. Coeur Rochester, Inc.,* 147 F.3d 1104, 1108 (9th Cir.1998).

We have recognized two methods by which a plaintiff may establish a continuing violation. *Gutowsky v. County of Placer,* 108 F.3d 256, 259 (9th Cir.1997). First, the plaintiff may show a serial violation by pointing to a series of related acts against one individual, of which at least one falls within the relevant period of limitations. *Id.*; *Morgan v. Nat'l RR Passenger Corp.,* 232 F.3d 1008 (9th Cir.2000).[9/] For example, in a case alleging discrimination on the basis of national origin, we permitted the plaintiff to introduce acts of discrimination by his employer that occurred outside of the statute of limitations

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9. The Supreme Court granted certiorari in this case to resolve a circuit conflict over the application of the "related series" continuing violations doctrine in hostile work environment cases. *Nat'l R.R. Passenger Corp. v. Morgan,* --- U.S. ----, 121 S.Ct. 2547, 150 L.Ed.2d 715 (2001). Because the present case involves the second method of establishing a continuing violation--a systemic violation--the Supreme Court's decision is unlikely to control this case.

period because they were sufficiently related to later, timely incidents of discrimination. *Sosa v. Hiraoka,* 920 F.2d 1451, 1455 (9th Cir.1990). Second, a plaintiff may show a "systematic policy or practice of discrimination that operated, in part, within the limitations period-a systemic violation." *Morgan,* 232 F.3d at 1015-16. In *Gutowsky,* for example, we concluded that the plaintiff's case was timely because she alleged the existence of "widespread policy and practices of discrimination of which she complains continued every day of her employment, including days that fall within the limitations period." 108 F.3d at 260.

Douglas alleges that CYA's color vision requirement constitutes a systemic policy of discrimination. A systemic violation claim "requires no identifiable act of discrimination in the limitations period, and refers to general practices or policies, such as hiring, promotion, training and compensation." *Provencher v. CVS Pharmacy, Div. Of Melville Corp.,* 145 F.3d 5, 14 (1st Cir.1998). "In other words, if both discrimination and injury are ongoing, the limitations clock does not begin to tick until the invidious conduct ends." *Mack v. Great Atl. & Pac. Tea Co.,* 871 F.2d 179, 183 (1st Cir.1989).

Our decisions applying the systemic policy or practice method of demonstrating a continuing violation have largely arisen in the context of placement or promotion discrimination cases. *See Green v. Los Angeles County Superintendent of Schools,* 883 F.2d 1472, 1480 (9th Cir.1989); *Morgan,* 232 F.3d at 1016. We are now confronted with a case where the plaintiff alleges discrimination in hiring. We must therefore consider whether the maintenance of a systemic discrimination policy, when combined with repeated efforts by the plaintiff to gain

employment, extends the accrual of the limitations period in such a case.[10]

We begin our analysis of the timeliness of Douglas's claims by reviewing the statute of limitations periods and the facts relevant to Douglas's assertion that his claims were timely under a continuing violation theory. The relevant periods of limitations are different for Douglas's Rehabilitation Act and ADA claims. A one-year statute of limitations applies to the Rehabilitation Act Section 504 claim.[11] Because Douglas filed suit in federal court on July 6, 1998, the Rehabilitation Act claim is barred by the statute of limitations if the claim accrued before July 5, 1997. Douglas's ADA claim is timely if he filed an administrative charge with the EEOC within 300 days of the

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10. We need not decide the broader question whether the maintenance of a systemic policy of discrimination *alone* is enough to extend the limitations period in a failure to hire case. We note that the Fifth Circuit has answered this question in the negative, reasoning that "[i]f the mere existence of a policy is sufficient to constitute a continuing violation, it is difficult to conceive of a circumstance in which a plaintiff's claim of an unlawful employment policy could be untimely." *Abrams v. Baylor Coll. of Med.*, 805 F.2d 528, 533 (5th Cir.1986). In our view, this rationale ignores the fact that the employer may end the period of exposure to litigation by disavowing the discriminatory policy.

11. The statute of limitations for the Rehabilitation Act Section 504 claim is provided by the analogous state law. In this case, both parties agree that California's one-year statute of limitations for personnel injuries governs Douglas's Section 504 claim. *See Wilson v. Garcia,* 471 U.S. 261, 276-80, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985); Cal. Civ. Proc. § 340(30).

alleged violation.[12/] Douglas filed his discrimination charge with the EEOC on April 18, 1997. Applying the 300 day period, Douglas's claim must relate to discrimination that occurred on or after June 22, 1996 to be timely.

Douglas applied for the position of group supervisor in 1994, and again in 1996. He submitted an affidavit stating that applications remain on file for approximately two years because the CYA only administers the application test every two years. Douglas argues that the continuing violations doctrine should apply because although he was denied the position on March 1, 1996, he applied again for the job in October of 1996. Douglas appealed the denial of his first 1994 application, and the appeal was denied by the State Personnel Board in February of 1997. There is no evidence in the record indicating a response by CYA to Douglas's second job application, submitted in the fall of 1996. By the time of the third application period, the fall of 1998, Douglas had filed suit.

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12. Before filing an ADA suit, a plaintiff must timely file a discrimination charge with the EEOC. 42 U.S.C. § 12117(a). Filing a timely charge is a statutory condition that must be satisfied before filing suit in federal court. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982). In order to be timely, the plaintiff must file a discrimination charge with the EEOC within 180 days after the alleged violation. 42 U.S.C. § 2000e-5(e). If the plaintiff files a charge with an appropriate state agency, he or she must file the charge with 300 days after the alleged violation. The EEOC in Douglas's case referred the charge to the California Department of Fair Employment and Housing, triggering the 300-day limitations period. *EEOC v. Comm. Office Products Co.*, 486 U.S. 107, 111, 108 S.Ct. 1666, 100 L.Ed.2d 96 (1988).

Applying the continuing violations doctrine to these facts, we are guided by two earlier Ninth Circuit decisions. In *Domingo v. New England Fish Co.*, 727 F.2d 1429 (9th Cir.1984), *amended* 742 F.2d 520 (9th Cir.1984), we considered a class action suit against a cannery operator involving allegations of discrimination on the basis of race in hiring and promotions. The plaintiffs argued that their claims were saved from the time bar by the fact that the discriminatory hiring and promotion polices continued until the plaintiffs brought suit. *Id.* at 1443. We required the plaintiffs to demonstrate that because of the discriminatory policy, they were either discriminated against or "exposed to discrimination" during the limitations period. *Id.*

Almost a decade later, we again addressed the issue whether a case was timely under a continuing violations theory based on an alleged systemic discrimination in hiring. *EEOC v. Local 350, Plumbers and Pipefitter,* 998 F.2d 641, 643 (9th Cir.1993). The EEOC filed an Age Discrimination in Employment Act suit on behalf of union members who were excluded from hiring lists on the ground that they received pension benefits. *Id.* at 643. We noted that the union's policy that excluded retirees from the hiring lists applied to the class members as early as 1984, five years earlier. *Id.* at 644. We found that the action was not barred by the relevant statute of limitations, because the discriminatory policy prohibiting retirees from joining the hiring lists continued. *Id.* ("Here, Local 350's allegedly discriminatory policy was in effect when [the plaintiff] first encountered [the policy] in 1984 and remains in force today. Thus, under the continuing violations doctrine, relief for [the plaintiff] is not barred."). Although we did not cite *Domingo* in our analysis in *Local 350,* the two decisions are consistent. In *Local 350,* the plaintiffs, as union members, continued to be "exposed" to the discriminatory hiring policies of the union.

Thus, under *Domingo* and *Local 350,* the critical inquiry is whether in this case, Douglas has introduced facts, which if viewed in the light most favorable to him, raise material questions about whether he was "exposed" to CYA's discriminatory policy during the period of limitations. We conclude that Douglas raised material questions of fact about whether CYA continued to discriminate against him by not considering or responding to his pending application during the 1996-1998 period. When Douglas applied in 1994, he proceeded successfully through each of the hiring steps, until he reached the vision test at the end. We have no reason to believe that Douglas was less qualified when he re-applied in 1996. It is a reasonable inference from these facts that CYA failed to respond to Douglas's 1996 application throughout the 1996-1998 period because of its discriminatory policy about the vision test. In any event, by reapplying in the fall of 1996 during the window for applications for hiring in 1996-1998, Douglas remained "exposed" to CYA's discriminatory vision policy during the entire 1996-1998 period. This exposure renders his claims timely by extending the claims past the June 22, 1996 deadline for filing his ADA claim, and the July 5, 1997 deadline for filing his Rehabilitation Act claim.

In sum, after reviewing the facts in the light most favorable to Douglas, we conclude that he has raised material facts about whether his claim extended into 1997 and 1998, making his claims under the ADA and Rehabilitation Act timely.[13/]

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13. We note that in some circuits, "[e]ven where a plaintiff alleges a violation within the appropriate statute of limitations period, the continuing violation claim will fail if the plaintiff was or should have been aware that he was being unlawfully discriminated against while the earlier acts, now untimely, were taking place." *Provencher,* 145 F.3d at 14. This is often referred to as the "notice requirement," and typically

Accordingly, we reverse the district court's grant of summary judgment.

CONCLUSION

We conclude that California has waived its sovereign immunity with regard to Section 504 of the Rehabilitation Act by accepting Rehabilitation Act funds. With respect to the ADA claim, we REMAND to the district court the question whether the state waived its Eleventh Amendment immunity under the ADA in this case. We REVERSE the district court's grant of summary judgment on both the Rehabilitation Act and ADA claims because we conclude that the claims were timely filed under the continuing violations doctrine.

REVERSED and REMANDED.

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applies in cases involving serial violations. However, "[t]his court has never adopted a strict notice requirement as the litmus test for application of the continuing violation doctrine." *Morgan,* 232 F.3d at 1015. In our view, the continuing violations doctrine would apply to Douglas's claim in any case because the touchstone of the notice inquiry is whether it would be reasonable to expect the plaintiff to sue before the statute expired. *See Galloway v. General Motors Serv. Parts Operations,* 78 F.3d 1164, 1167 (7th Cir.1996). In this case, we cannot say Douglas acted unreasonably by pursuing each avenue of appeal identified to him, and by reapplying for the position.

[Filed August 27, 1999]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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DOSSEY DOUGLAS,

Plaintiff,

v.

THE STATE OF CALIFORNIA DEPARTMENT OF YOUTH AUTHORITY,

Defendant.

NO. CIV. S-98-1281 WBS PAN

MEMORANDUM AND ORDER

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The California Youth Authority ("defendant" or "CYA") moves for summary judgment on the grounds that plaintiff Dossey Douglas did not timely file a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") as required for his claim of a violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§12101 et seq., and did not timely file this action claiming a

violation of Section 504 of the federal Rehabilitation Act of 1973, 29 U.S.C. § 794.

On March 1, 1996, the CYA notified plaintiff that he was rejected for employment as a Group Supervisor, because he was unable to meet the color vision standards for the Group Supervisor position. Plaintiff pursued internal grievance procedures, filing an internal complaint of discrimination with the CYA's Equal Employment Office and appealing the CYA's decision to the California State Personnel Board. On April 18, 1997, plaintiff filed a charge of discrimination with the EEOC. On May 7, 1998, the EEOC issued to plaintiff a "right-to-sue" letter. Plaintiff filed this action within 90 days of receipt of the letter, on July 6, 1998.

The ADA requires that plaintiff exhaust his administrative remedies by filing a charge of discrimination with the EEOC within 180 days after the alleged unlawful employment practice occurred, or, where plaintiff has initially

instituted proceedings with the appropriate state agency, within 300 days after the alleged unlawful employment practice occurred. 42 U.S.C. §§ 12117(a), 2000e-5(e)(1). In this case, the EEOC referred the charge to the California Department of Fair Employment and Housing, which means that the 300-day limitations period applies to the ADA claim. See EEOC v. Commercial Office Products Co., 486 U.S. 107, 111, 108 S. Ct. 1666, 1668, 100 L. Ed. 2d 96 (1988); see also Tinsley v. First Union Nat'l Bank, 155 F.3d 435, 439 (4th Cir. 1998). Plaintiff filed his EEOC charge over 300 days after learning on March 1, 1996 that he was rejected from employment on the basis of his color-vision impairment.

In California, an action for a violation of Section 504 of the Rehabilitation Act must be filed within the one-year period of limitations.[1/] Plaintiff filed suit over two years after

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1. Because Section 504 of the Rehabilitation Act does not expressly provide a statue of limitations, courts borrow the most appropriate state time limitations. Alexopulos v. San Francisco Unified School District, 817 F.2d 551, 554 (9th Cir. 1987). A majority of the courts have held that the statue of

being notified that CYA rejected him from employment on the basis of his color-vision impairment.

Plaintiff argues, however, that the CYA has continuously maintained its allegedly discrimination policy before and during the limitations periods for his ADA and Rehabilitations Act claims and that the policy continues to this day. He contends that the CYA thus engaged in a continuous violation, such that his claims are not time-barred.

Under the continuing violation doctrine, events occurring outside the limitations period may be considered as

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limitations applicable to an action pursuant to Section 504 of the Rehabilitation Act is the state's personal injury statute of limitations. Independent Housing Services of San Francisco v. Fillmore Center Associates, 840 F. Supp. 1328, 1345 (N.D. Cal. 1993); Scott M. Smith, What Statute of Limitations Applies in Actions Under § 504 of Rehabilitation Act of 1973, 120 ALR Fed § 621. In California, the period of limitations in a personal injury case is one year. Cal. Code of Civ. Pro. § 340 (3); Independent Housing Services, 840 F. Supp. at 1345.

Even under the minority view, that the most analogous statute of limitations is that of the state statute prohibiting discrimination on the basis of disability, Wolsky v. Medical College of Hampton Roads, 1 F.3d 222 (4th Cir. 1993), the period of limitations in California would still be one year. See Cal. Gov't Code § 12960.

a basis for the claim so long as those events are part of an on-going unlawful employment practice. Draper v. Coeur Rochester, Inc., 147 F.3d 1104, 1107 (9th Cir. 1998). To establish a continuing violation, plaintiff must show a series of related acts, one or more of which falls within the limitations period, or the maintenance of a discriminatory system which operates against the plaintiff both before and during the limitations period. Green v. Los Angeles County Super. of Sch., 883 F.2d 1472, 1480 (9th Cir. 1989). However, the continuing violation doctrine only applies if a violation occurred within the limitations period; the mere persistence if discriminatory effects does not suffice. See United Airlines, Inc. v. Evans, 431 U.S. 553, 558, 97 S. Ct. 1885, 1889, 52 L. Ed. 2d 571 (1977) ("But the emphasis should not be placed on mere continuity; the critical question is whether any present violation exists").

The maintenance of an allegedly discriminatory policy is not sufficient to trigger the continuing violations doctrine;

plaintiff must also show that the policy was applied to him during the limitations period. As the court stated in Sandoval v. Saticoy Lemon Ass'n, 747 F. Supp. 1373 (C.D. Cal. 1990):

> In order to avoid exposing an employer to an open-ended period of liability, it is appropriate that a plaintiff show some application of the illegal policy to him within the [limitations period]. "If mere existence of a policy is sufficient to constitute a continuing violation, it is difficult to conceive of a circumstance in which a plaintiff's claim of an unlawful employment policy could be untimely."

Id. at 1386 (quoting Abrams v. Baylor College of Medicine, 805 F.2d 528, 533 (5th Cir. 1986).

Plaintiff contends that the court may also consider events that occurred after the limitations period, and indeed after the filing of the lawsuit, for the purpose of deciding whether a continuing violation exists. Plaintiff's position, however, conflates two separate inquiries: (1) whether there is a continuing violation, such that a valid claim exists; and (2) assuming a valid claim exists, whether the scope of the claim may extend to provide relief for post-filing events. That the scope of the relief may in some cases extend to compensate

for discrimination occurring after filing of the lawsuit does not negate the fact that the continuing violation doctrine requires that at least one violation occur during the limitations period.

Domingo v. New England Fish Co., 727 F.2d 1429, 1444 (9th Cir. 1984), and Chung v. Pomona Valley Community Hospital, 667 F.2d 788, 792 (9th Cir. 1982), are cited by plaintiff for the proposition that the court may consider events occurring subsequent to the filing of the complaint. These cases concern the second inquiry. In Domingo, the scope of the relief afforded plaintiffs was held to encompass relief for discrimination suffered after the filing of the lawsuit. Domingo, 727 F.2d at 1444. However, the court also held that as a prerequisite to obtaining relief each class member had to demonstrate that he or she had suffered discrimination during the limitations period. Id. at 1443.

In Chung, the court noted that if plaintiff could show a pattern of discrimination, he might also show that a post-

filing event was part of the pattern. Chung, 667 F.3d at 792. In Chung, however, it is also clear that a discriminatory act occurred within the limitations period on plaintiff's Title VII claim. Id. at 790; cf. Sosa v. Hiraoka, 920 F.2d 1451, 1455-57 (9th Cir. 1990) (analyzing the scope of the court's jurisdiction over events occurring after the filing of the EEOC charge, in a case where there was a violation within the limitations period). Domingo and Chung are consistent with the requirement that plaintiff demonstrate a violation, or, in this case, an application of the discriminatory policy to him, during, rather than after, the limitations period.

Thus, for the continuing violation doctrine to apply to preserve plaintiff's ADA claim, there must have been some application of the policy to him during the 300 days prior to the filing of his EEOC charge, i.e., between June 22, 1996 and April 18, 1997. For the claim under Section 504 of the Rehabilitation Act, the relevant period during which there

must have been some application of the policy to him is July 6, 1997 to July 6, 1998.

Plaintiff argues that two events occurred which trigger the continuing violations doctrine: (1) that he re-applied for the position of Group Supervisor at the CYA and took the written examination on October 26, 1996, within the limitations period of the ADA claim; and (2) that, in the fall of 1998, he inquired whether the policy was still in effect and that the continued existence of the policy deterred him from re-applying.[2/]

Plaintiff's October 26, 1996 re-application and participation in the examination does not show that the policy was applied to him during the limitations period. Plaintiff

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2. The evidentiary basis for this second event is plaintiff's declaration, which is unfortunately incomplete regarding this event. Plaintiff's statement cuts off abruptly after: "In or about the fall of 1998, I learned that the California Youth Authority was again testing for the Group Supervisor position. I talked with one Senior Group Counsellor [sic], who is a supervisor at the DeWitt Facility about the upcoming examination. I asked if color. . . ." (Douglas Decl. ¶ 46.)

has not presented evidence that in this second round he was disqualified from employment on the basis of the color vision standard or that he was even required to take the color vision test. At oral argument, counsel for plaintiff effectively conceded that plaintiff has not been denied a position on the basis of his color-vision impairment since the CYA's March 1, 1996 decision.

Neither does plaintiff demonstrate that the policy injured him during the limitations period when he contends that he was deterred from applying for the Group Supervisor position in the fall of 1998 because the policy was still in force. This event occurred after, not during, the applicable limitations periods. Plaintiff shows only that the policy continued during this time, which is insufficient to constitute a continuing violation. See Sandoval, 747 F. Supp. at 1386.

Plaintiff cites several authorities for the proposition that being deterred from applying for a position can constitute actionable discrimination. In each of these cases, however,

the plaintiff was deterred from application during, rathe than after, the limitations period.[3/] These cases do not support plaintiff's argument that being deterred from applying for a position after the filing of litigation triggers the continuing violation doctrine.

The court finds that plaintiff has not shown an application of the policy to him within the limitations period

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3. In Gutowsky v. Placer County, 108 F.3d 256 (9th Cir.), cert. denied, 118 S. Ct. 298 (1997), plaintiff was deterred from applying for the transfer up to the day she left employment with defendant. The court held that the continuing violation occurred each day until the last day of employment, which was within the limitations period. Gutowsky, 108 F. 3d at 260.

Similarly, in Sandoval, 747 F. Supp. 1373, the violations continued throughout the period before the filing of the EEOC charge, despite the fact that one of the plaintiffs did not re-apply for a position. Id. at 1387. The discriminatory acts in question, including actively discouraging one plaintiff from applying, occurred during, not subsequent to, the limitations period. Id.

In Roberts v. North American Rockwell Corp., 650 F.2d 823, 827-28 (6th Cir. 1981), plaintiff applied continuously, and was rejected continuously, until it became futile for plaintiff to re-apply formally. As contrasted with the present case, the plaintiff in Roberts was actively discouraged from applying for employment on September 11, 1973, a date within the limitations period. Id. at 828.

and thus that he has not shown the existence of a continuous violation.[4/] Accordingly, plaintiff failed to exhaust administrative remedies on his ADA claim, because he did not timely file his EEOC charge within 300 days of March 1, 1996. Similarly, his Rehabilitation Act is time-barred because the limitations period ran as of March 1, 1997.

Plaintiff argues that the running of the limitations period on his Rehabilitation Act claim should be equitably tolled, due to his pursuit of the CYA Equal Employment Office discrimination complaint and appeal to the State Personnel Board. He contends he reasonable and in good faith pursued these remedies because, although the CYA informed him of these internal grievance procedures, it did not inform him of

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4. Indeed, to find differently would mean that any plaintiff faced with a motion to dismiss a time-barred claim could save the claim simply by inquiring about his chances of obtaining a job with defendant and then amending the complain to allege that he was discouraged from applying.

the need to file a lawsuit or an EEOC charge to preserve his legal remedies.[5/]

California's equitable tolling doctrine allows a plaintiff to toll the state statute of limitations when he or she has several formal legal remedies and reasonably and in good faith pursues one. Fobbs v. Holy Cross Health System Corp., 29 F.3d 1439, 1444 (9th Cir. 1994), cert. denied, 513 U.S. 1127 (1995). Before plaintiff may benefit from the doctrine, however, he must overcome three threshold matters: (1) the tolling doctrine must not be inconsistent with federal policy underlying the cause of action under consideration; (2) the remedy pursued by plaintiff in the first forum must address

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5. Despite plaintiff's contention that the CYA thereby misled him, he indicated at oral argument that he was not arguing that the limitations period should be tolled by equitable estoppel. In any event, plaintiff has not submitted evidence that defendant intentionally or knowingly misled him, as would be necessary to support and equitable estoppel argument. See United States v. Marolf, 173 F.3d 1213, 1218 n.3 (9th Cir. 1999); Stallcop v. Kaiser Foundation Hospitals, 820 F.2d 1044, 1050 (9th Cir.), cert. denied, 484 U.S. 986 (1987).

the same wrong as that sought to be remedies by the arguable time-barred claim; and (3) three core elements must be met - that plaintiff gave timely notice to defendant of the first claim, that defendant is not prejudiced in gathering evidence to defend against the second claim, and that plaintiff acted in good faith and with reasonable conduct in filing the second claim. Id. at 1445; cf. Estate of Blue v. County of Los Angeles, 120 F.3d 982, 984 (9th Cir. 1997) (discussing only the core elements where it was clear that the first two threshold criteria were met).

In this case, the court need not reach the core elements of timely notice, no prejudice, and good faith, because it is established federal law that the running of the limitations period is not tolled during the pendency of an internal grievance procedure. Delaware State College v. Ricks, 449 U.S. 250, 261, 101 S. Ct. 498, 506, 66 L. Ed. 2d 431 (1980); Fobbs, 29 F.3d at 1446 (rejecting tolling pending internal review process, pursuant to Delaware State College, despite

the fact that plaintiff had arguably met the three core elements). Equitable tolling is not warranted during the pendency of the State Personnel Board appeal and, thus, plaintiff's claim under Section 504 of the Rehabilitation Act is time-barred.[6/]

IT IS THEREFORE ORDERED that defendant's motion for summary judgment be, and the same hereby is, GRANTED.

DATED: August 27, 1999

/s/
WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

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6. The court does not reach the more complicated question of whether the running of the limitations period applicable to the Rehabilitation Act claim should be equitably tolled during the pendency of the EEOC investigation, because the Rehabilitation Act claim was already time-barred by April 18, 1997, the date plaintiff filed his charge of discrimination with the EEOC.

[Filed August 27, 1999]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DOSSEY DOUGLAS,

Plaintiff,

v.

THE STATE OF CALIFORNIA DEPARTMENT OF YOUTH AUTHORITY,

Defendant.

JUDGMENT IN A CIVIL CASE

CASE NUMBER:
CIV. S-98-1281 WBS PAN

XX – Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF 8/27/99.

Jack L. Wagner,
Clerk of the Court

ENTERED: August 27, 1999

by: /s/
C HUTCHISON,
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

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BEFORE THE HONORABLE WILLIAM B. SHUBB,

CHIEF JUDGE

---oOo---

DOSSEY DOUGLAS,

Plaintiff,

vs.

No. Civ. S-98-1281

THE STATE OF CALIFORNIA DEPARTMENT OF YOUTH AUTHORITY,

Defendant.

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REPORTER'S TRANSCRIPT

MOTION FOR SUMMARY JUDGMENT

MONDAY, AUGUST 23, 1999

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Reported by: KELLY O'HALLORAN, CSR #6660

APPEARANCES

For the Plaintiff:

LAW OFFICES OF DAVID C. ANTON
75 Kingston Road
Kensington, California 94707
BY: DAVID C. ANTON
MARGARET ROECKL

For the Defendant:

OFFICE OF THE ATTORNEY GENERAL
FOR THE STATE OF CALIFORNIA
1515 Clay Street, 20th Floor
Oakland, California 94612
BY: T. MICHELLE LAIRD
Deputy Attorney General

SACRAMENTO, CALIFORNIA

MONDAY, AUGUST 23, 1999, 1:30 P.M.

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THE CLERK: Civil case 98-1281; Dossey Douglas versus Department of Youth Authority. This is on for a motion for summary judgment, your Honor.

MS. LAIRD: Good afternoon, your Honor. Michelle Laird appearing on behalf of the California Youth Authority.

MR. ANTON: Good afternoon. David Anton and Margaret Roeckl on behalf of plaintiff Dossey Douglas.

THE COURT: Ms. Laird, what would you like to say in support of the motion?

MS. LAIRD: Your Honor, I'm very much inclined to pass on initial oral argument unless the Court has any specific questions to ask me or unless the Court feels that I didn't address any of the issues raised by plaintiff in his opposition adequately. I would reserve some time, however, for rebuttal, if necessary.

THE COURT: Do you agree that the plaintiff applied a second time for the same position?

MS. LAIRD: I have no evidence one way or the other regarding that, your Honor. It did not come up during my taking of his deposition, nor did the later 1998 alleged deterrence issue come up.

THE COURT: Do you have any reason to believe that he did not?

MS. LAIRD: Well, I didn't have time to follow up on that with my client. He's asserted it in his declaration under penalty of perjury. At this point I would have to accept it, although I would question whether that's relevant given that it's not for purposes of the continuing violation doctrine asserted by plaintiff. It doesn't appear that the policy was applied to him, nor that he was deterred from applying because of the policy during that time period that you're speaking of.

THE COURT: Why not?

MS. LAIRD: Well, because the cases say that the policy has to be applied, has to affect the plaintiff during the time period. And this case is different from those cases where it was simply a matter of individuals who applied but weren't, for example, called for interviews or who were deterred from applying during the 300-day or 180-day time period prior to the filling of the EEOC complaint.

In those cases, they were either deterred because of the policy or they were not hired and not allowed to apply because of the alleged systematic policy of discrimination. In this case, the plaintiff was not told that he could not fill out an application. He apparently took the test. He apparently got on the list, although we don't have any information about what rank he fell into. If he was in the first three ranks, he would be eligible for interviews and possible offer of employment. Again, that would be contingent on passing the color vision exam. But as far as we know,

the farthest that plaintiff got during this 1996 application process was applying for and taking the written exam.

THE COURT: But I thought that he's contending that the same policy prevented him the second time from getting a job.

MS. LAIRD: I don't see that that statement's made in their opposition. They simply state that he applied for the job or he applied for the written examination and took the written examination. He doesn't say that he was deterred from applying because of the policy, nor that he went over the various hurdles and actually got to that point where the color vision exam would have been administered to him.

THE COURT: All right. Well, let me find out then. Thank you. Mr. Anton.

MR. ANTON: Good afternoon, your Honor.

THE COURT: Good afternoon.

Did you learn anything about Russian law?

MR. ANTON: I have to admit I dazed over it. It was interesting that they have an arbitration court and a regular court. I couldn't figure out what the difference would be if you were -- courts hear arbitrations outside of have it. So it might just be a semantic thing.

THE COURT: It's interesting to try to understand something that's completely foreign. It's hard to get a handle on it.

MR. ANTON: Because if you're both court state systems, and one's called court and one's called arbitration, the difference, to me, loses any distinction outside of the label you give it.

THE COURT: It's a little like us trying to understand the difference between law and chancery when we don't have that kind of system.

MR. ANTON: I'm glad I passed the bar and didn't have to take that section special.

THE COURT: All right. Tell me about this case.

MR. ANTON: First, I'll just touch on the issue you brought up, and then I'll touch on some of the broader issues.

In this one, some of the timing is important to understand. Because one of the things that the state has alleged just right here and also in their papers is the issue of deterrence to apply. The timing is important to know. He applied in '94 and then was turned down in early '96 for the first job. And in that process, they said you can go through these administrative appeals, through the State Personnel Board and the like, which he did. While he's doing that appeal, he had the hearing in August of '96 with the State Personnel Board.

Late '96, they have a second job, as you call it -- actually, what I understand is that they do applications for these jobs about every two years, thousands of people apply, and they develop hiring lists from those thousands of people who apply.

And in the '94 one, he had ranked high, had gotten an early job notice, which was the one that came out in '96 and which is the subject of the appeal.

In late '96, they did, as you call it, the second job. He applied for that. They had changed the procedure a little bit. With the first one, they had a written test and an oral test. With the second one, they streamlined, cut down some of their expenses and the like, and they just did a written test. He took the written test in about, I think it's about October of '96. And before he hears anything, he finds out that --

he gets a decision from the State Personnel Board on his appeal, his appeal about the color vision being denied, they say we're going to uphold the California Youth Authority, and you're excluded, you're barred, and you can seek rehearing, which he did.

That is the first time -- well, actually, when he

seeks the rehearing and they reconfirm that they're going to enforce the color vision, when that is known, and that is early '97 is when he gets the decision from State Personnel Board, and then the reconfirming, I believe, is the summer of '97.

When the '98 job comes around, he now has been told very clearly through the State Personnel Board and through his re-request, and now he's also gone to the EEOC and sought their help, and through the EEOC has found out that the Youth Correctional Authority is standing by their policy. He finds out they're doing the exam in '98 and checks to see if they're enforcing that color vision for '98 or if they backed off enforcing the policy, sees if there's any way around it, finds out there's none, and now he's deterred from applying.

THE COURT: But what I want to know is did he take the test?

MR. ANTON: The vision test?

THE COURT: No.

MR. ANTON: Did he take the written test?

THE COURT: Yes.

MR. ANTON: Yes.

THE COURT: What happened?

MR. ANTON: He fell into the pool of thousands and thousands of people and hasn't gotten a notice to take a vision test.

THE COURT: Okay. So his color vision hasn't come into play in connection with this second job?

MR. ANTON: Almost. The color vision -- let me do the entire consideration here. The hiring list that they have, the use of the first hiring list is used for a long period of time. In fact, it overlaps when the exam for the second one takes place. Every time someone's hired off that, he's not hired off it because of color vision.

When the second test comes around and he does the written exam, you're correct, they have not sent him to

another color vision exam.

THE COURT: This is what I want to know. Have they denied him the job at any time since the original application because of his color blindness?

MR. ANTON: Only through the processes through the State Personnel Board and the EEOC. They've reconfirmed that denial.

You're absolutely right. As far as a formal statement you are denied from a job, that that formal statement was the March '96 formal statement. He has not gotten that type of formal statement for the late '96 job, which is the second job.

THE COURT: Well, then I want to know your argument, because there are two separate issues here. One under the Rehabilitation Act, whether you filed it within the statute of limitations, and the first one under the continuing violation doctrine on the ADA claim.

MR. ANTON: Go ahead with your question.

THE COURT: Because on the ADA claim, you have to file your charge with the EEOC less than 180 days after the conduct that you're complaining of.

MR. ANTON: Or 300.

THE COURT: Or 300?

MR. ANTON: Yes. Because of the deferral statute.

THE COURT: Okay.

MR. ANTON: But either way --

THE COURT: For each of those you rely on the continuing violation doctrine?

MR. ANTON: Correct.

THE COURT: But the continuing violation doctrine is a lot like the statute of limitations argument in that it only applies if a violation occurred within the statutory period.

So what is the violation that you're looking at within the statutory period?

MR. ANTON: Let me broaden it out a little bit, because the cases normally discuss that language, but

it's actually broader than that.

In the cases that have an issue of a policy, here you have policy which has for the '94 job, the first job, excluded him, he's applied in the second job, we don't know if it's because of their decision that they already had made through the State Personnel Board or something else, why he hasn't been given that. He's been well-known. He went through all the procedures. What is the reason why he hasn't gotten sent to a medical exam for the second job? We don't know. Was it because of the policy and they knew it was him because he'd gone through all these steps? We don't know. But the part that makes this easy so you don't have to really worry about the second job, and that is the cases that look at the policy, one, look at whether there is a deterrence from the application. And the deterrence, we have no question that he's -- he has presented evidence that the '98, the third job, he is deterred from applying for that because of the color

vision standard and everything he's gone through which confirms that the policy is being enforced.

THE COURT: Well, you know, that's my concern. You've got this language in the Fifth Circuit -- I think you're familiar with it -- Abrams vs. Baylor College of Medicine. And it's been cited by district courts in our circuit. "If the mere existence of a policy is sufficient to constitute a continuing violation, it is difficult to conceive of a circumstance in which a plaintiff's claim of an unlawful employment policy could be untimely."

MR. ANTON: Correct. I understand the problem with that. And here, the Ninth Circuit's also addressed the idea of whether deterrence -- many circuits have looked at the concept of deterrence -- has the policy kept you from applying. And here for the '98 or the third job, this guy has gone through hurdle after hurdle. He's gone through the State Personnel Board multiple times. He's gone through the internal EEO

office. He's gone to EEOC. It's been made absolutely clear to him that that policy exists.

He's interested in this job. In '98, he does extensive inquiry to find out whether the policy's being applied again. This is not some ghost or fabric situation. In Roberts vs. North American Rockwell, that circuit talked about, and the Ninth Circuit has agreed with it, the concept of deterrence.

THE COURT: Right. You're talking about Gutowsky.

MR. ANTON: Right. Gutowsky and also Sandoval.

THE COURT: Sandoval is a District Court case.

MR. ANTON: Gutowsky is exactly one of them.

THE COURT: All right. You're talking about that. In Gutowsky, the plaintiff was employed by the company, and the company actively deterred her from applying for a transfer up to the time that she left the company.

Now, that's different than somebody who's not employed who just every once in a while wants to check

and see if you still have that policy, and then he's going to bring it maybe five, ten years down the road. You see, that's why the Fifth Circuit said what it did, and that's why the courts in our circuit have cited to that language.

This is from the Central District in Sandoval. "In order to avoid exposing an employer to an open-ended period of liability," the court says, "it is appropriate that a plaintiff show some application of the illegal policy to him within the limitations period." Now, that's different than saying the policy still exists. The plaintiff has to show some application to him.

MR. ANTON: Right. And you have to figure out Gutowsky fits in with that. Because Gutowsky says that the environment was such so she no longer applied. And the Ninth Circuit, looking at that, said here are the facts that existed. That woman was subjected to them, and then she claimed that that environment, those acts,

made it so that she was deterred from applying. Here, I mean that's --

THE COURT: No, he wasn't deterred from applying. He actually did apply.

MR. ANTON: You mean our fellow?

THE COURT: Right.

MR. ANTON: Our fellow has applied multiple times.

THE COURT: You can't tell me he was deterred because he kept applying.

MR. ANTON: Yes, I can tell you he was deterred. And the reason I can tell you he was deterred is that the first two, he's still hopeful. The first one he didn't know about it because the policy didn't exist until after he took the test. The policy didn't exist for seven months after he took the test. They imposed that after he took it.

On the second one, he was on multiple appeals through the State Personnel Board and hadn't gotten a decision. He applied the second time while the State

Personnel Board, three or four months down the road, is going to issue their decision upholding the California Youth Authority.

The third time is when he's deterred. That's the 1998 job. That's the first time he now has everything in front of him, where the State Personnel Board is standing behind that decision. He also has, through the EEOC, the EEOC has contacted the California Youth Authority, said you're discriminating, and they said we're going to stand by it anyway.

Now, where this Court may have some concern is that's in 1998. But this circuit and other circuits have said that if you have later occurring events, those are ones that the Court must recognize and deal with.

THE COURT: I know, but that's later occurring events, not a continuing policy.

What event are you relying on?

MR. ANTON: I'm relying on three multiple events. The first application where he gets turned down. Then

with that one event, the multiple series where he appeals and they reconfirm it. The second one where he applies, and it is admitted that that policy still exists for that job. It exists still today. He applies. And the third one for the 1998 where he seeks to find out if the policy is still being applied, finds out it is, and is deterred from applying.

Under Ninth Circuit law, Domingo vs. New England Fish, which we've cited, and other Ninth Circuit cases, this Court is to look at those later events.

THE COURT: So under your theory, any plaintiff who let the statute of limitations run on him could simply make an inquiry of the defendant as to what his chances are of obtaining a job, and if they say, well, no better than they were the first time, then that's it. The statute of limitations is revived.

MR. ANTON: Well, kind of the question becomes then what -- I always love when I get those setups. That setup is not one that we have here. But even if we

had that, if you were able to find that that last one met the standard for the deterrence, that U.S. vs. Teamsters, one of the first cases we ever had from the U.S. Supreme Court where blacks are excluded from the Teamsters, and Justice Marshall wrote for the majority decision and said we're going to allow these people who haven't filed timely charges to bring those because the Teamsters made it so clear blacks were not going to get hired, that if you can show you've been deterred from applying, then that equals your rejection because the policy is there.

Here, this is no question that there's a policy that excludes this person from this job. Absolutely no question. He goes in there -- and the last one that you're talking about is at a time if he brings the complaint, and with that last one is timely, yes, the complaint is timely, and then the question becomes what's the scope of relief.

It may well be that the earlier events are things

that this Court can consider in whether the policy applies and everything else, but you can't get monetary relief for.

There's a difference between the question of relief and whether the complaint is something this Court can deal with.

THE COURT: All right.

MR. ANTON: That's why they have the continuing violation.

THE COURT: All right. As an aside, I'm really hesitant to ask this. I'm just curious.
How are you going to show that the inability to distinguish between various shades of green prevents someone from engaging in a major life activity, or what major life activity is it that they're prevented from engaging in?

MR. ANTON: Maybe I'm a smarter attorney than that. Maybe I go under the prong does the defendant regard this as a disability? And that's a prong I

intend to take in this case. That's not with this motion.

But here what we have is we have a job that's existed for 40 years without a color vision exclusion. We have, as a result of the ADA being passed, which is designed to bring people into the work force who have been excluded from disabilities, we have the California Youth Authority establishing and starting a color vision standard which excludes people. And in the 40 years that the job existed, there's never been a problem regarding anybody with color vision.

THE COURT: What major life activity do you think the employer perceives your client as being unable to perform?

MR. ANTON: Complete range of seeing. Seeing.

THE COURT: All right. Anything else?

MR. ANTON: Yes. Yes.

With the Rehab Act, which we have, the Ninth Circuit's made clear you have to borrow not only the

statute of limitations from the state but its tolling policies. And here what we have is a clear fit of the equitable tolling concept. There are three tests for California's equitable tolling. Timely notice to the defendant. That's one. Two, lack of prejudice to gather evidence. Three, good faith and reasonable conduct by the plaintiff in pursuing the writ that he did.

Here, for the Rehab Act claim, which equitable tolling applies and California law applies, we have timely notice out the wazoo with this plaintiff. He was immediately on the California Youth Authority when they turned him down, and they said go to the State Personnel Board appeal process and at the same time go to our own internal EEO office and make a discrimination complaint, both of which he did.

THE COURT: Do you think that's evidence that they intended to deceive him?

MR. ANTON: That's mixing -- I'll answer your

question second. Because that's mixing up the equitable estoppel theory and the equitable tolling theory.

THE COURT: You're correct. I'm getting ahead of you there.

MR. ANTON: And I, despite what the defendants say, I'm pushing the equitable tolling theory. They want me to use the equitable estoppel, because then I have to show that they're trying to mislead him. I think these people were just telling what they normally tell people.

The concept for equitable tolling is does the defendant know about the issue? Can they get evidence about it? Is there any prejudice? And is the fellow doing it in good faith?

All of those questions, not one of them have the defendants said has to be a no. Because none of them can be a no. He did exactly what they told him to do. He goes to them and says you're cutting me out because of my color vision. I don't like it. What do I do?

They say file a complaint with us. We'll process it. File it with the State Personnel Board. We'll process it. He does exactly that.

He goes through that whole thing. Then they say if you don't like this decision, file it with the EEOC. He does exactly that.

He is told from like the first week that they tell him you're out of here because of color vision up until the day this complaint is filed.

THE COURT: Did he file his EEOC complaint under the ADA or the Rehabilitation Act or both?

MR. ANTON: I don't believe that those things that people file with the EEOC have a box check for any of those laws. I believe there is no provision that says it's under Title VII or the ADA or whatever.

THE COURT: Oh.

MR. ANTON: So the answer is neither. It's a generic. It's because of color vision, and they excluded me, and that sort of thing.

So even if the continuing violation concept doesn't work, which I think it absolutely should here with this policy that's excluding him and other people up to this present day, even if you don't agree with that, the Rehab Act claim is equitably tolled. There is absolutely no reason that the defendants can say that they've been prejudiced or this hasn't been in good faith. He's done everything they have told him to do, and now they're saying he's untimely because he paid attention to us.

THE COURT: All right. Let me hear from the other side on this, because these technical arguments about tolling and what goes on before the EEOC are almost impossible to understand, because it's very hard to understand what the EEOC is doing. For the reasons that Mr. Anton says, I can't tell the difference between a Rehabilitation Act claim or a Title VII claim or an ADA claim. I don't know what the EEOC does. I don't know why they exist. So I have a lot of problems with these

arguments based on what goes on before the EEOC or the DFEH. They're very difficult.

And I have one in a trial that's pending right now before me. And I just wish that Congress would abolish the EEOC and prevent this silly requirement of exhausting remedies. The only remedy that people have is in federal court. The EEOC is just a necessary irritant.

All right. So let me hear what you have to say about this whole exhaustion thing or tolling.

MS. LAIRD: Tolling, in particular.

THE COURT: It's not exhaustion here. It's tolling.

MS. LAIRD: Right. First of all, I'd just point out that the Teamster's U.S. Supreme Court case was not a continuing violations case. So taking language from that does not support plaintiff's position here of applying continuing violation based on the 1998 deterrence.

In any event, plaintiff did not file any EEOC complaint within 300 days of that alleged deterrence either. Therefore, he hasn't exhausted his administrative remedies as to the deterral period.

On the California equitable tolling, I would direct the Court to the Fobbs vs. Holy Cross Health System Corp. case at 29 F.3d 1439. It is cited in my brief. In that case an individual requested the court to apply California's equitable tolling theory to his 1981 claim. He had also filed an untimely Title VII claim and requested tolling of his 1981 claim based on two theories. One, that he had filed a complaint with the Office of Civil Rights and suggested that that would toll the time period for the 1981 claim based on the same arguments made by Mr. Anton here. And the second, he argued that the internal review process, essentially the same argument that plaintiff is making here with the SPB, would toll the time period.

Under both arguments, the Ninth Circuit denied

application of equitable tolling on those facts because, number one, the 1981 claim that he was pursuing the remedies were not -- the remedies that he was seeking in the federal court were not the same remedies that the Office of Civil Rights could have given to the plaintiff. And under the internal view process, the effect of the tolling of the internal review process, the court simply said that that is against the Delaware State College vs. Ricks decision which explicitly states the --

THE COURT: Can the EEOC award general damages?

MS. LAIRD: I do not believe so, unless the government then takes the case and prosecutes it on behalf of the individual.

THE COURT: Then the remedy that the EEOC can award is never, ever the same as what a District Court can award, ever. That's the reason for my comment earlier. So I don't understand what you're saying. What about tolling from the time that he filed his

EEOC claim?

MS. LAIRD: Until the time that he filed his complaint in federal court?

THE COURT: Right.

MS. LAIRD: He doesn't suggest any reason why he should get tolling during that time period.

THE COURT: I thought he did.

MS. LAIRD: Well, by the time he had filed his EEOC complaint, the SPB had already issued its decision that the CYA's determination not to hire him based on his failing the color vision test was appropriate. So there's no explanation of why he waited then more than a year after that to file a federal Rehab Act Claim in this court.

THE COURT: But what about the argument that the time that his EEOC claim was pending ought to be counted towards equitable tolling?

MS. LAIRD: That's essentially the same argument that the plaintiff made in Fobbs. And unfortunately, I

didn't read this within the past 24 hours, and I don't want to state something is in here that's not. But the court basically addressed the same issue and found that that did not toll it. That the OCR complaint did not toll the period within which he could bring his 1981 claim.

THE COURT: I thought that was an internal grievance procedure.

MS. LAIRD: No. He made that argument on both grounds. One, the internal grievance procedure tolled it. The other, filing with the Office of Civil Rights tolled it. And court denied equitable tolling on the basis of both arguments.

THE COURT: Okay. I thought Fobbs stood for the proposition that under California's equitable tolling doctrine, the plaintiff may be able to toll the state statute of limitations when you have several formal legal proceedings, legal remedies, and he reasonably in good faith pursues one of them. I'll go back and look

at it.

MS. LAIRD: I can take a few minutes if the Court wouldn't mind.

THE COURT: No.

MS. LAIRD: Because I know I relied on this in making my argument that it's not appropriate for that tolling argument, that tolling theory, to be applied in this case.

THE COURT: I'm not sure I have a few minutes. Go ahead.

MS. LAIRD: Okay. Well, first the court says that -- the court doesn't really address the argument of tolling being inconsistent with federal policy with regard to the prong where the plaintiff's alleging that the OCR complaint tolled the limitations period. We're making the argument here that it is inconsistent with federal policy under the Ricks case, for the same reasons why it's inconsistent to toll it under the internal review process.

Secondly, in the Fobbs case, the court said that the issue was governed by the Johnson vs. Railway Express Agency case, that's 421 U.S. 454, in which the plaintiff filed charges with the EEOC and then was issued a right to sue letter and filed a timely Title VII action, and then also added a cause of action under 42 USC 1981. The court held that the plaintiff's Section 1981 action was time barred even though plaintiff delayed bringing the 1981 suit because he was waiting for the EEOC's recommendation because -- and it quotes from the Johnson case, "The remedies available under Title VII and under 1981, although related and although directed to most of the same ends, are separate, distinct, and independent."

Therefore, in the Fobbs case, the court held that Mr. Fobbs failed to meet two of the threshold requirements to have the California equitable tolling doctrine apply to his case.

THE COURT: All right. Thank you.

MS. LAIRD: Thank you, your Honor.

THE COURT: Anything else?

MR. ANTON: I just thought I'd make one or two comments on those. Since it is late, I'll try to be quick.

One, on Fobbs, the fact that the person is going through the Office of Contract Compliance, they have no role in addressing any individual issues. They have a role about whether the federal contractor has its contract pulled.

So unlike the EEOC, the DFEH, and all those organizations where the focus is the individual and their issue of discrimination, the Office of Contract Compliance has no role on that.

So what you talked about Fobbs saying under California law, one of several legal remedies, the Office of Contract Compliance isn't a remedy or doesn't have any role in that for an individual.

But here, each of the entities that Mr. Douglas

went to at the direction of the California Youth Authority has a remedy or a procedure for providing redress to individuals for employment decisions and discrimination.

The State Personnel Board, the written records that we supplied, it was the California Youth Authority who said for your complaints of discrimination, you file it with us, and then you go to the State Personnel Board if you don't agree with it. He was pursuing a legal remedy under the state procedure.

THE COURT: Under the ADA?

MR. ANTON: See, that's part of the problem with this. Even though this is a state entity and it goes to the EEO office of the state entity, they don't tell him to go to the EEOC for the ADA issues, which they know about, until he gets completely done with his State Personnel Board hearing, which happens to be after a year is over.

So because this individual relied on the direction

from the California Youth Authority and pursued the legal remedies available to him under the state law, the State Personnel Board --

THE COURT: For what kind of discrimination?

MR. ANTON: They can handle everything.

THE COURT: No. What was he complaining of?

MR. ANTON: Color vision discrimination. Exactly what we're doing with here.

THE COURT: Under the FEHA?

MR. ANTON: He wasn't sophisticated enough to know which laws it was under. He was saying you're discriminating against me because of color vision. That's not right. Reverse the California Youth Authority and give me a job. And that was the essence of the appeal. And the appeal decision is one of the exhibits that we submitted.

He was doing exactly what someone in good faith would do. He did exactly what the California Youth Authority told him to do.

Fobbs, even the case they cite, says California law applies, and if you're pursuing in good faith a state remedy, you have it tolled. Not a state remedy. A legal remedy. And he's doing that from day one up until the complaint was filed here.

THE COURT: All right. Thank you.

MS. LAIRD: Your Honor, just a point of clarification. I'm not sure where the Office of Contract Compliance came from. What I was speaking to is the Office of Civil Rights. It's the Office of Civil Rights where Mr. Fobbs filed his original administrative claim.

THE COURT: Thank you. This motion is taken under submission.

MS. LAIRD: Thank you, your Honor.

(Proceedings were concluded.)

---oOo---

REPORTER'S CERTIFICATE
---oOo---

STATE OF CALIFORNIA)
) ss.
COUNTY OF SACRAMENTO)

I, KELLY O'HALLORAN, certify that I was the official Court Reporter, and that I reported verbatim in shorthand writing the foregoing proceedings; that I thereafter caused my shorthand writing to be reduced to typewriting, and the pages numbered 1 through 28, inclusive, constitute a complete, true, and correct record of said proceedings:

COURT: U.S. District Court - Eastern District of California
JUDGE: Honorable WILLIAM B. SHUBB, Judge
CAUSE: Dossey vs. California of Youth Authority
Case No. Civ. S-98-1281
DATE: August 23, 1999

IN WITNESS WHEREOF, I have subscribed this certificate at Sacramento, California, on the 26th day of October 1999.

KELLY O'HALLORAN
CSR No. 6660

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

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479-3011

February 4, 2002

Ms. T. Michelle Laird
Deputy Attorney General
110 West A Street, Suite 1100
San Diego, CA 92101

Re: California Department of Youth Authority
v. Dossey Douglas
Application No. 01A578

Dear Ms. Laird:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice O'Connor, who on February 4, 2002, extended the time to and including April 13, 2002.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By
/s/
Jeffrey D. Atkins
Assistant Clerk

Supreme Court, U.S.
FILED
MAY 20 2002
CLERK

No. 01-1546

In The Supreme Court of the United States

CALIFORNIA DEPARTMENT OF YOUTH AUTHORITY,

Petitioner,

v.

DOSSEY DOUGLAS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION

DAVID C. ANTON
Counsel of Record
817 Colby Drive
Davis, California 95616
(530) 759-8421
Counsel for Respondent

MARGARET E. ROECKL
75 Kingston Road
Kensington, California 94707
(510) 525-7097

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether time-barred disability discrimination claims based on an express denial of employment for failure to meet a hiring standard are revived by the continuing violation doctrine where the plaintiff re-applies for the position during the limitations period and while the hiring standard is still in effect, but there is no application of the hiring standard to the plaintiff within the limitations period.

2. Whether the Ninth Circuit contradicted U.S. Supreme Court decisional authority, stating that collateral appeals of an employment decision do not serve to toll limitations periods, by concluding that the plaintiff's claims were timely under the continuing violation doctrine because he acted reasonably during the limitations period by pursuing collateral appeals of a denial of employment and re-applying for the position, rather than filing suit.

LIST OF PARTIES

Petitioner before this Court, appellee in the proceedings before the Ninth Circuit, and defendant in the case is the State of California, California Department of Youth Authority.

Respondent before this Court, appellant in the proceedings before the Ninth Circuit, and plaintiff in the case is Dossey Douglas, an individual.

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II. THE NINTH CIRCUIT'S APPLICATION OF THE CONTINUING VIOLATION DOCTRINE TO THE FACTS OF THIS CASE DOES NOT CREATE A CONFLICT WITH OTHER UNITED STATES SUPREME COURT DECISIONS, NOR WITH OTHER CIRCUITS, NOR DOES IT RAISE IMPORTANT FEDERAL ISSUES, TO JUSTIFY REVIEW 10

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Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701, *et seq.* 2

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is published at 271 F.3d 812 (9th Cir. 2001) and is reprinted in the Petitioner's Appendix at App. A-1 through A-21.

The opinion of the Court of Appeals for the Ninth Circuit denying rehearing en banc, and the dissent, is published at 285 F.3d 1226 (9th Cir. 2002) and is reprinted in the Petitioner's Supplemental Appendix at Supp. App. A-1 through A-12.

The Memorandum and Order of the United States District Court for the Eastern District of California (Shubb, Chief D.J.) and the corresponding Judgment, dated August 27, 1999, are reprinted at App. B-22 through App. B-37 of Petitioner's Appendix. The transcript of the oral argument on August 23, 1999 before the District Court is reprinted in the Petitioner's Appendix at App. C-38 through App. C-76.

STATEMENT OF JURISDICTION

Respondent agrees with the Statement of Jurisdiction of Petitioner California in its Petition. Jurisdiction of this Court to review the judgment of the Ninth Circuit is based on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Respondent agrees with the listing of the Statutes Involved of Petitioner California in its Petition. The

statutes involved are the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* ("ADA"), and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701, *et seq.* ("Section 504").

STATEMENT OF THE CASE

Respondent agrees with many of the basic statements of the case presented by Petitioner, and will not repeat those here. However, Petitioner both misstates matters and fails to inform the Court of information that is critical to the Supreme Court's consideration of this case.

Respondent Douglas did apply for a job as a Group Supervisor at the California Youth Authority ("CYA") in 1994. Douglas scored very highly in the examination, and was given Veteran's preference points due to his 12 years of service in the Navy. Douglas had served an extended period of time as a naval air traffic controller. In 1994 when Douglas applied for the job of Group Supervisor, the CYA had no color vision job standard. The Group Supervisor position had existed for over five decades, had never tested nor excluded anyone from the job due to color vision deficiencies, and had never had any problems due to individuals with color vision deficiencies. The California State Personnel Board ("SPB") determined in approximately 1992 to engage in evaluating and revising the job standards for the Group Supervisor position due to the passage of the ADA, to ensure that the job standards used did not screen out individuals with disabilities. In a bizarre twist, the job standards study triggered by the passage of the ADA did not remove barriers to the hiring of

individuals with color vision, but rather erected color vision barriers to hire for the first time.

In 1996, Douglas was given a conditional offer of hire as a Group Supervisor. Douglas was required to be given a physical examination, including vision testing. Douglas passed all physical examinations, and the background investigation, but did not pass the color vision testing. The color vision standards had first been adopted by the CYA to be effective June 1, 1995. The CYA grandfathered all the current employees, and has never tested the employees as of May 31, 1995 for color vision. Only new hire employees as of June 1, 1995 were subjected to the color vision standard.

1. DOUGLAS ASKED HOW HE WAS TO FILE A COMPLAINT OF DISABILITY DISCRIMINATION AND WAS DIRECTED BY DEFENDANT TO FILE WITH THE SPB AND THE CYA's EQUAL EMPLOYMENT OFFICE RATHER THAN THE EEOC.

Petitioner described that Douglas was rejected from hire by letter from the Chief Medical Officer of the CYA dated March 1, 1996 due to the results of Douglas' color vision testing. However, Petitioner failed to inform this Court of the directions the CYA gave to Douglas when the CYA informed Douglas of his rejection. In the rejection letter the CYA directed Douglas:

> "If you wish to file a formal appeal, it must be directed to the State Personnel Board of Appeals Division . . . in writing within 30 days of receipt of this letter."

No mention was made by the CYA through the letter that Douglas was to file with the EEOC to challenge the rejection due to color vision. Further, on March 24, 1996, Douglas personally went to the CYA to the Equal Employment Office and talked with the Equal Opportunity Technician and stated that he wanted to file a formal complaint of disability discrimination due to his rejection as a result of the color vision policy. Douglas was advised by the CYA EEO Technician that Douglas was to file a complaint of disability discrimination by filing it with the EEO office of the CYA. Douglas was not advised that he was to file a complaint of disability discrimination with the federal EEOC.

Douglas did file a written complaint of disability discrimination with the CYA EEO office on March 28, 1996 due to the specific directions of the CYA. The CYA EEO office denied Douglas' complaint by letter dated May 2, 1996. The May 2, 1996 letter directed that "You may appeal this determination to SPB (State Personnel Board) within 30 days of receipt of this letter." Douglas appealed the EEO decision, along with the original rejection, to the SPB, as he was directed by the CYA to do. A formal hearing was conducted by the SPB on August 13, 1996 on Douglas' complaint of disability discrimination. A decision was issued on February 19, 1997. The SPB wrote to Douglas on February 27, 1997 that if he objected to the decision of the SPB denying his complaint of disability discrimination, he could seek review by filing with the EEOC, or re-hearing with the SPB. The February 27, 1997 letter to Douglas was the first directive to Douglas that a complaint for challenging the disability discrimination due to color vision was to be directed to the EEOC. All prior directions from CYA and the SPB were specifically that

Douglas should file complaints through specific State offices, namely the California CYA Equal Employment Office and the California State Personnel Board.

Douglas did promptly go to the California deferral agency, the California Department of Fair Employment and Housing in March of 1997, that directed Douglas to the EEOC. An EEOC charge was developed and signed by Douglas on April 9, 1997, less than 45 days after the February 27, 1997 letter from Petitioner that first advised Douglas to file with the EEOC. The charge was mailed by Douglas in Sacramento to the EEOC in Oakland, California, with an EEOC filing date of April 18, 1997, only 50 days from the date of the February 27, 1997 letter. On February 23, 1998 the EEOC issued a discrimination "cause finding," based on its determination that the CYA color vision requirement for the Group Supervisor position violated the ADA.

2. DOUGLAS APPLIED FOR THE GROUP SUPERVISOR POSITION ON OCTOBER 26, 1996 AND WAS THEREAFTER DETERRED FROM RE-APPLYING FOR THE POSITION OF GROUP SUPERVISOR DUE TO THE COLOR VISION POLICY.

On October 26, 1996 the CYA conducted examinations again for the position of Group Supervisor. Douglas timely submitted a written application and took all required tests on October 26, 1996. The color vision policy of the CYA continued to be in effect and applied to all applicants. Approximately four months after being tested on October 26, 1996, Douglas on February 19, 1997 received written notice from Petitioner that Douglas' complaint of discrimination had been rejected and that he was disqualified from

employment as a Group Supervisor due to his color vision deficiencies.

Douglas continued his efforts to seek employment as a Group Supervisor. On May 5, 1997, Douglas appeared before the California Senate Rules Committee Chaired by then-Senator Lockyer, now the California Attorney General, when the Deputy Director of the CYA was before the committee. Douglas asked that his exclusion from employment as a Group Supervisor due to color vision deficiencies be considered and reversed.

In 1998, Douglas learned that the CYA was again engaging in examinations for the position of Group Supervisor. Douglas was still interested in working as a Group Supervisor. Douglas made inquiries of supervisors of the CYA to determine if the color vision policy was still in effect, and was informed that it was. As a result of the continued policy that excluded him from employment as a Group Supervisor, Douglas was deterred from re-applying in 1998.

The District Court granted summary judgment for the CYA finding that the complaint by Douglas was untimely. In the summary judgment proceedings, the CYA presented no evidence whatsoever to establish any reasons, other than application of the color vision policy, why Petitioner was not offered employment as a result of his application in 1996.

Petitioner erroneously asserts in its Petition at page 7, footnote 1, that Douglas had not contended that he was denied employment due to a discriminatory policy of the CYA. Throughout the complaint, Douglas contends that the policy of the CYA is discriminatory and continues to deter Douglas from obtaining and from seeking employment as a Group Supervisor, including specific

continuing policy allegations in paragraphs 26 though 28 of the complaint. Additionally, Petitioner in the same footnote references that Plaintiff did not "allege" that Douglas re-submitted a written application for the Group Supervisor position. However, the broad notice pleading standards in federal court do not require such a specific statement. Any effort by the footnote of Petitioner to create an inference that such an application did not in fact happen is inappropriate and false, for the record on summary judgment submitted unrefuted facts that such a re-application did take place, and re-testing was done.

REASONS FOR DENYING THE WRIT ON THE GROUNDS STATED BY PETITIONER

The sole question presented by the CYA Petition is whether the Ninth Circuit properly applied the continuing violation doctrine in reaching its conclusion that Douglas' claims were timely. First, as the Ninth Circuit ruled, the Petitioner failed in its efforts to obtain summary judgment on this issue because the factual record was inadequate to support its claims. This Court need not and cannot decide the issue of the applicability of the continuing violation doctrine based on the inadequate record presented by Petitioner CYA.

Second, in an effort to gain review Petitioner argues the existence of a conflict and an important question of federal law. However, review by certiorari is not warranted in this case because there is no conflict between the circuits, and the issues in this case are fundamentally different from the issues raised by the case of *Morgan v. National Railroad Passenger Corp.*, 232 F.3d 1008 (9th Cir. 2000), cert. granted, 533 U.S. 927 (June 25, 2001) and the

other United States Supreme Court cases cited by Petitioner.

Third and finally, due to the procedural posture of the case, state law issues of estoppel and tolling must be analyzed if this Court is to consider the continuing violation doctrine on the factual record of this case. Such issues, based upon application of state law, do not raise any federal law issues, let alone any important and pressing federal question worthy of review by the United States Supreme Court.

I. THERE IS INSUFFICIENT EVIDENCE IN THE RECORD TO DECIDE THE APPLICABILITY OF THE CONTINUING VIOLATION DOCTRINE ON THE QUESTIONS PRESENTED BY PETITIONER.

It is important to reference the procedural posture of this case currently. Petitioner was granted summary judgment on the issue of whether Respondent's claims were timely. The Ninth Circuit reversed, after deciding de novo, that the facts, viewed in the light most favorable to Respondent, were insufficient to support a grant of summary judgment. The facts in the record show that Respondent Dossey Douglas applied for a position with Petitioner in 1994 and again in 1996. Respondent's State Personnel Board appeal was denied in 1997, and Respondent was deterred from applying for a position in 1998 when he was informed that the discriminatory color vision policy was still in effect for the Group Supervisor position. The Ninth Circuit's opinion is a careful analysis of the specific facts in this case, as noted in the concluding paragraphs that " . . . after reviewing the facts in the light most favorable to Douglas, we conclude that he has raised

material facts about whether his claim extended into 1997 and 1998, making his claims under the ADA and Rehabilitation Act timely". The Court further remarked in a footnote that under the facts the Court " . . . could not say Douglas acted unreasonably by pursuing each avenue of appeal identified to him and by reapplying for the position."

The procedural posture of this case at the present time is not a case where a trial has been concluded and the factual record is complete and immutable. The Ninth Circuit applied the law to the facts presented, made the presumptions required by law in the light most favorable to Douglas and held that currently, Petitioner failed to present sufficient facts to obtain a grant of summary judgment on the issue of timeliness. By bringing a factually deficient record to the United States Supreme Court, Petitioner is asking the Court to look at factual issues that Petitioner wishes were in the record, not legal issues of federal significance. For example, Petitioner makes the bold assertion that the color vision policy "was not enforced to deny Respondent employment within the limitations period", specifically referring to the application submitted in October of 1996. However, in support of its summary judgment motion, Petitioner submitted absolutely no facts related to the October 1996 application and why Douglas was not offered employment. Thereafter, only four months later in February of 1997, Petitioner advised Douglas in writing that he was disqualified from hire as a Group Supervisor because of the color vision policy.

At the summary judgment phase, all reasonable inferences are to be made in favor of Douglas and against

the CYA. Due to the nature of the factual record of this case at this stage, the Supreme Court would be compelled to evaluate the continuing violation on a factual record with major voids and a wide range of potential inferences, rather than a solid factual base. The procedural posture of this case makes it clear that there are factual issues to be resolved before the Petitioner can seek to bar Respondent Douglas' claims based upon the legal issue of timeliness.

II. THE NINTH CIRCUIT'S APPLICATION OF THE CONTINUING VIOLATION DOCTRINE TO THE FACTS OF THIS CASE DOES NOT CREATE A CONFLICT WITH OTHER UNITED STATES SUPREME COURT DECISIONS, NOR WITH OTHER CIRCUITS, NOR DOES IT RAISE IMPORTANT FEDERAL ISSUES, TO JUSTIFY REVIEW.

Petitioner attempts to classify this case as being in conflict with *Morgan v. National Railroad Passenger Corp.*, 232 F.3d 1008 (9th Cir. 2000), cert. granted, 533 U.S. 927 (June 25, 2001) a case recently subject to Supreme Court review. The issues presented by this case are clearly distinguishable from those reviewed in *Morgan*. The *Morgan* case deals with the application of the continuing violation doctrine to a serial case; a case where there was a series of related acts against an individual that made up a claim of racial harassment and discrimination. The employee in *Morgan* complained of a racially hostile work environment, racially biased discipline, a racially biased pay scale, and retaliation for complaining of discrimination. The employee claimed that these acts began when he was initially hired and continued until his

termination. The *Morgan* case presented the classic situation in which the Courts are asked to apply the continuing violation doctrine to a serial violation case.

At issue in the present case is the application of the continuing violation doctrine to a systemic discriminatory policy, namely the Petitioner's policy that prohibits individuals with color vision disabilities from being hired as Group Supervisors. A systemic violation is one in which a systemic policy or accepted practice of discrimination operated, in part, within the limitations period. The issues in the *Morgan* case dealt with evidence presented at trial and the jury instructions given in a case involving serial acts of discrimination and have absolutely no bearing on the continuing violation doctrine as it applies to a grant of summary judgment in a systemic policy case.

The other cases with which Petitioner attempts to manufacture a conflict in order to gain review by this Court are similarly distinguishable. *Delaware State College v. Ricks,* 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980) dealt with a tenure decision that was based upon one individual's national origin. *Ricks* is again, a serial acts case, not a systemic policy of discrimination case. *Ricks* did not allege an adopted policy of ethnic discrimination that prevented his receipt of tenure, merely that at the time that his tenure decision was made, an individual making the decision had a discriminatory motive.

In *United Air Lines, Inc. v. Evans,* 431 U.S. 553, 97 S. Ct. 1885, 52 L. Ed. 2d 571 (1977) the aggrieved employee originally lost her job due to a discriminatory no-marriage policy and later challenged the employer's seniority system, wherein she was not given credit for prior service. The Court concluded that the discriminatory

no-marriage policy, which had been challenged and found to be discriminatory, was changed and was not in effect at the time that she applied for rehire. Respondent in *Evans* could not complain of any current policy in effect that was discriminatory. Her complaint that the legitimate seniority system, when applied to her, had a discriminatory impact due to the prior no-marriage policy.

In the instant case, the discriminatory hiring policy of the Petitioner State of California came into existence and effect on June 1, 1995, and has been a bar to the employment of Respondent Douglas. The policy was a bar when Douglas was denied employment based on his 1994 application. The policy was a bar to employment as a Group Supervisor when Douglas applied for the job in October of 1996. The policy was a bar to his employment as a Group Supervisor when the State applied the policy to deny Douglas' State Personnel Board appeal in February of 1997 and when he was deterred from applying for employment in 1998 due to the Petitioner's insistence that the policy be applied to current applicants for the Group Supervisor position.

Havens Realty Corp. v. Coleman, 455 U.S. 363, 102 S. Ct. 1114, 71 L. Ed. 2d 214 (1982) is not in conflict with the decision in this case, but actually supports the conclusion that the continuing violation doctrine is applicable to this case. In the *Havens* case, a policy of racial steering existed. Coleman was a tester and had standing to sue. She made one inquiry regarding housing and the Petitioner tried to steer her into certain housing based upon a policy of racial bias. As a tester, Respondent Coleman made no other efforts to gain housing after her one early attempt. Coleman did not go back to see if the policy regarding racial steering for housing would be

applied again, did not seek any further housing and did not seek review of the Petitioner's policy with any state, federal or local agency within 180 days of her sole attempt to obtain housing. Her claim as a tester was held to be time-barred. However, the agency for which she was working as a tester challenged the racially discriminatory steering policy even though two of its three testers were subjected to the policy more than 180 days prior to filing claims of racial discrimination in housing. In reaching its conclusion that the agency was timely, this Court in *Havens* stated:

> "We agree with the Court of Appeals that for purposes of § 812(a), a 'continuing violation' of the Fair Housing Act should be treated differently from one discrete act of discrimination. Statutes of limitations such as that contained in § 812(a) are intended to keep stale claims out of the courts. See *Chase Securities Corp.* v. *Donaldson, 325 U.S. 304, 314 (1945).* Where the challenged violation is a continuing one, the staleness concern disappears. Petitioners' wooden application of § 812(a), which ignores the continuing nature of the alleged violation, only undermines the broad remedial intent of Congress embodied in the Act, see *Jones v. Alfred H. Mayer Co., 392 U.S. 409, 417 (1968).* Cf. *Zipes* v. *Trans World Airlines, Inc., post,* at 398. Like the Court of Appeals, we therefore conclude that where a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within 180 days of the last asserted occurrence of that practice."

Havens at 455 U.S. at 380-381.

The record on appeal shows, and contains information from which the Ninth Circuit drew valid inferences, that Respondent Douglas was subjected to Petitioner's policy of discrimination in the hiring process on numerous occasions in 1996, 1997 and 1998. Under the rationale in *Havens*, Douglas' claims are claims of a systemic policy of discrimination and are timely. The cases cited by Petitioner show no conflict regarding the application of the continuing violation doctrine, eliminating any proper grounds for this Court to review the Ninth Circuit's ruling regarding the timeliness of Respondent Douglas' claims.

III. THE RECORD REGARDING THE TIMELINESS OF RESPONDENT'S CLAIMS COMPELS THIS COURT TO ANALYZE STATE LAW ISSUES OF EQUITABLE TOLLING OF THE STATUTE OF LIMITATIONS FOR WHICH THERE ARE NO GROUNDS FOR REVIEW BECAUSE NO FEDERAL QUESTION IS PRESENTED.

If this Court grants review of the instant case based on the application of the continuing violation doctrine, the Court will also have to examine whether or not the statute of limitations was tolled. The Ninth Circuit did not have to look in detail at the factual or legal issues regarding tolling because it concluded that the claims of Respondent were timely. However, if the Supreme Court is to consider the issue presented by Petitioner for review, the factual basis for and legal issue of tolling must be addressed. The Ninth Circuit's conclusion that Respondent "acted reasonably" is a factual issue that is directly relevant and related to the issue of tolling and would need to be addressed.

In determining whether the statute of limitations is tolled, the Court must look to the law of the state of California regarding tolling. This Court did directly hold that state tolling provisions were to apply to civil rights statutes. The Supreme Court stated: ""No federal policy – deterrence, compensation, uniformity, or federalism – [is] offended by the application of state tolling rules." *Chardon v. Fumero Soto,* 462 U.S. 650, 657, 103 S. Ct. 2611, 2616, 77 L. Ed. 2d 74, 81 (1983). See also, *Ellis v. City of San Diego,* 176 F.3d 1183, 1189 (9th Cir. 1999) "Equitable tolling of the statute of limitations is a defense to all federal statutes of limitations, even those expressly contained within a given cause of action, unless tolling would be inconsistent with the legislative purpose". The Fifth Circuit has held that pursuit of a grievance before a county personnel board was entitled to equitable estoppel tolling. The Fifth Circuit held that since the state involved would have tolled the statute of limitations during the administrative grievance, under Supreme Court precedent, the tolling was consistent with the policies underlying the federal statute (Section 1983) involved, and tolling should be allowed. *Rubin v. O'Koren,* 644 F.2d 1023, 1025 (5th Cir. 1981) [citing *Board of Regents v. Tomanio,* 446 U.S. 478 (1980).] The Ninth Circuit revisited the legal standard for equitable tolling in a case of disability discrimination under the Rehabilitation Act and held that California's equitable tolling principles were applicable to that disability discrimination case. *Daviton v. Columbia/HCA Healthcare Corp.,* 241 F.3d 1131, 1136-1139 (9th Cir. 2001). The Ninth Circuit also noted that there was no dispute "that the equitable tolling rules of California, together with the state's statutes of limitations, can be applied without intruding upon any . . . federal policy." *Id.* 241 F.3d at p. 1141.

Respondent claims that the statute of limitations was tolled during the pendency of his appeal before the Petitioner's State Personnel Board. Therefore, in the event that the claims of Respondent Douglas are called into question on the present Writ under the continuing violation doctrine, this Court will be compelled to look at California's equitable tolling rules, which are clearly matters of state law, which do not implicate any federal issues. A complete lack of any important federal question or issue, and the existence of state law issues makes review by this Court unnecessary.

CONCLUSION

For the reasons stated, the petition for certiorari filed by the State of California should be denied.

Dated: May 20, 2002

Respectfully submitted,

David C. Anton
Counsel of Record
Margaret E. Roeckl
Counsel for Respondent
Dossey Douglas

(4)

No. 01-1546

Supreme Court U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

CALIFORNIA DEPARTMENT OF YOUTH AUTHORITY.
Petitioner,

v.

DOSSEY DOUGLAS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General of the State of California
PAMELA SMITH-STEWARD
Chief Assistant Attorney General
DAVID S. CHANEY
Senior Assistant Attorney General
DENNIS W. DAWSON
MIGUEL A. NERI
Supervising Deputy Attorneys General
*T. MICHELLE LAIRD
Deputy Attorney General
*Counsel of Record
110 West "A" Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2323
Fax: (619) 645-2581
Counsel for Petitioner

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QUESTIONS PRESENTED

1. Whether time-barred disability discrimination claims based on an express denial of employment for failure to meet a hiring standard are revived by the continuing violation doctrine where the plaintiff re-applies for the position during the limitations period and while the hiring standard is still in effect, but there is no application of the hiring standard to the plaintiff within the limitations period.

2. Whether the Ninth Circuit contradicted U.S. Supreme Court decisional authority, stating that collateral appeals of an employment decision do not serve to toll limitations periods, by concluding that the plaintiff's claims were timely under the continuing violation doctrine because he acted reasonably during the limitations period by pursuing collateral appeals of a denial of employment and re-applying for the position, rather than filing suit.

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IN THE SUPREME COURT OF THE UNITED STATES

No. 01-1546

CALIFORNIA DEPARTMENT OF YOUTH AUTHORITY,
Petitioner,

v.

DOSSEY DOUGLAS, *Respondent.*

INTRODUCTION

On April 18, 2002, this Court docketed Petitioner California Department of the Youth Authority's petition for writ of certiorari to review the decision of the Court of Appeals for the Ninth Circuit in *Douglas v. California Department of Youth Authority*, 271 F.3d 812 (9th Cir. 2001), *reh'g en banc denied*, 285 F.3d 1226 (9th Cir. 2002) (O'Scannlain, J. dissenting). On May 20, 2002, Respondent, Dossey Douglas, filed a brief in opposition to the petition and a conditional cross-petition for writ of certiorari. On May 28, 2002, the briefs were distributed for a June 13, 2002 conference.

On June 10, 2002, this Court issued its decision in *National Railroad Passenger Corporation v. Morgan*, ___U.S. ___, 2002 U.S. LEXIS 4214 (2002) (O'Connor, J. concurring in part and dissenting in part). This Court's decision in *Morgan* further demonstrates why certiorari should be granted in this case.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT'S HOLDING IN *NATIONAL RAILROAD PASSENGER CORPORATION v. MORGAN* APPLIES THE APPLICABLE LIMITATION PERIODS TO EMPLOYMENT DISCRIMINATION CASES IN THE MANNER ADVOCATED BY PETITIONER AND SUPPORTS GRANTING THE PETITION FOR WRIT OF CERTIORARI

A. The Ninth Circuit's Decision In *Douglas* Conflicts With This Court's Decision In *Morgan* Regarding The Application Of The Relevant Statutes Of Limitation To Discrete Acts Of Alleged Employment Discrimination

On June 10, 2002, this Court issued its decision in *National Railroad Passenger Corporation v. Morgan*, ___U.S. ___, 2002 U.S. LEXIS 4214 (2002). In *Morgan*, this Court overturned, in part, a decision of the Court of Appeal for the Ninth Circuit, where the appellate court had applied the continuing violation doctrine to save otherwise time-barred Title VII claims based on discrete acts of alleged discrimination. *Morgan* held, unanimously, that the relevant statute of limitations -- which is the same for employment discrimination cases under both Title VII of the Civil Rights Act and Title I of the Americans with Disabilities Act -- "precludes recovery for discrete acts of discrimination ... that occur outside the statutory time period." This Court further stated that the term "unlawful employment practice" includes a discrete act such as the failure

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or refusal to hire an individual. This Court said, "[t]here is simply no indication that the [statutory] term 'practice' converts related discrete acts into a single unlawful practice for the purposes of timely filing." Thus, this Court concluded,

> ...discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges alleging that act. The charge, therefore, must be filed within the 180- or 300-day time period after the discrete discriminatory act occurred.

National Railroad Passenger Corporation v. Morgan, 2002 U.S. Lexis 4214

This Court then stated that the "unlawful employment practice" or "discriminatory act," "'occurred' on the day that it 'happened.'" Furthermore, this Court recognized that "[d]iscrete acts, such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination ... constitutes a separate actionable 'unlawful employment practice.'"

Accordingly, this Court has held, unanimously and in no uncertain terms, that a discrete act of alleged employment discrimination, such as a denial of employment, starts the statute of limitations to run, and that no later discrete act, even if related, will make actionable an earlier time-barred discrete act.

The rule espoused in *Morgan* is the rule of law advocated by Petitioner, both in the court of appeal and by way of its petition for writ of certiorari. Were the *Morgan* rule applied to the facts in *Douglas*, the compelled conclusion would be that Respondent's EEOC charge, filed 413 days after he was informed of his rejection for hire due to his failure to meet Petitioner's color vision standards, was untimely. In addition,

the *Morgan* rule would result in a determination that Respondent's Rehabilitation Act claim, which was filed in federal court on July 6, 1998, was also untimely, because it was filed more than one year after Petitioner informed Respondent of his rejection. CAL. CIV. PROC. CODE § 340(3) (West 1999).

This conclusion is compelled by *Morgan* whether or not Respondent re-applied, within the limitations period, for the position he was earlier rejected for and at a time when Respondent's color vision standard was still in place. *Morgan* holds that any subsequent alleged "acts" of discrimination "start a new clock for filing charges alleging that act." Thus, the court of appeal was required to consider Respondent's second job application as a potentially separate discrete "unlawful employment practice" or "discriminatory act," by Petitioner, and not, as it did, as a means of extending the accrual of the limitations period which commenced on the express denial of Respondent's initial job application based on his failure to meet Petitioner's color vision standards.

The "discrete act" analysis in *Morgan,* and its holding that the limitations period begins to run upon the occurrence of a rejection for hire, corresponds to the issues raised by Petitioner in its petition for writ of certiorari. This Court's opinion in *Morgan* thus supports the granting of the writ in this case.

B. The *Morgan* Decision Rejected The Application Of The *Galloway* Test, Which Was Relied Upon By The Ninth Circuit In Its Alternate Holding In Douglas

The *Morgan* decision additionally set forth a standard for the application of limitations periods in Title VII hostile work environment claims. While the established standard itself is not pertinent to this case because this case does not involve allegations of a hostile work environment, this Court's underlying analysis in *Morgan* on this point is significant. In

particular, in establishing a test for determining the timeliness of hostile work environment claims, a majority of this Court specifically rejected the application of the test espoused in *Galloway v. General Motors Service Parts Operations*, 78 F.3d 1164 (7th Cir. 1996). The *Galloway* test allows recovery to individuals for conduct taking place outside the time period for filing a timely claim where the plaintiff reasonably did not know such conduct was discriminatory or where the discriminatory nature of such conduct is recognized as discriminatory only in light of later events. *Galloway*, 78 F.3d at 1166-68.

As discussed in the petition for writ of certiorari, the Ninth Circuit applied the *Galloway* test to the facts in *Douglas* to find that, even if it applied a strict notice requirement to the facts, it would find that the continuing violation doctrine saved Respondent's claims because "we cannot say that Douglas acted unreasonably by pursuing each avenue of appeal identified to him, and by reapplying for the position." *Douglas v. California Department of Youth Authority*, 271 F.3d at 824, n.13, *citing*, *Galloway*, 78 F.3d at 1167. The petition for writ of certiorari argues that this alternate holding is contrary to *Delaware State College v. Ricks*, 449 U.S. 250 (1980), because it is essentially the impermissible "tolling" of the limitations period during the pursuit of administrative appeals, in direct conflict with this Court's decision in *Ricks*. The *Morgan* case supplies yet another basis for granting the writ on the grounds that the court of appeal's decision is now in conflict with a second United States Supreme Court precedent. This is because the *Galloway* test, utilized by the court of appeal to save Respondent's time-barred claims in an alternate holding, was specifically rejected by *Morgan* as a means of determining the timeliness of claims of discrimination occurring outside the limitations period. Accordingly, the *Douglas* alternate holding is in conflict with two separate United States Supreme Court decisions based on two separate analyses.

II.

THERE EXISTS NO LEGAL IMPEDIMENT TO GRANTING THE PETITION FOR WRIT OF CERTIORARI

Respondent argues in his opposition to the petition that: (1) this Court "cannot decide the issue of the applicability of the continuing violation doctrine based on the inadequate record presented by [Petitioner]"; and, (2) this Court cannot grant the writ in this case because to do so would require it "to look to the law of the State of California regarding tolling" which does not implicate any federal issues. (Opp. to Pet. at pp. 7-10) As will be shown below, Respondent's reasons for opposing the petition are not meritorious.

A. State Of The Record Regarding Application Of The Continuing Violation Doctrine

Respondent states that the court of appeal held "that currently, Petitioner failed to present sufficient facts to obtain a grant of summary judgment on the issue of timeliness" and, as a result Petitioner is seeking a writ of certiorari based on "a factually deficient record." (Opp. to Pet. at p. 9.) Specifically, Respondent disputes Petitioner's statement that Petitioner's "color vision policy 'was not enforced to deny Respondent employment within the limitations period,'" as a result of Respondent's October, 1996 re-application for employment. (Opp. to Pet. at p. 9.) Respondent thus concludes that "there are factual issues to be resolved before the Petitioner can seek to bar Respondent Douglas' claims based upon the 'egal issue of timeliness." (Opp. to Pet. at pp. 8-10.)

The continuing violation doctrine is a means to save otherwise time-barred claims. As such, the burden is on the party who seeks to have the doctrine apply -- in this case,

Respondent -- to present facts sufficient to trigger the application of the doctrine. *See Akron Presform Mold Co. v. McNeil Corp.*, 496 F.2d 230, 233 (6th Cir. 1974) [party seeking benefit of rules in avoidance of statute of limitations has burden of proof to establish them], *cert. denied*, 419 U.S. 997 (1974).

Here, Respondent failed to allege either in his complaint or in his Equal Employment Opportunity Commission charge, that he had re-applied for employment with Petitioner in October, 1996. This fact was raised for the first time in this case in Respondent's opposition to Petitioner's motion for summary judgment in the district court, in an attempt to have the continuing violation doctrine apply. As the district court in this cases found, in its decision, it was Respondent who had the burden and failed to:

> ...present evidence that in this second round he was disqualified from employment on the basis of the color vision standard or that he was even required to take the color vision test. At oral argument, counsel for plaintiff [Douglas] effectively conceded that plaintiff has not been denied a position on the basis of his color-vision impairment since the CYA's March 1, 1996 decision.

(App. B -30-31.)

In any event, the Ninth Circuit's opinion does not depend on whether Petitioner actually denied Respondent employment on the basis of the color vision standard within the limitations period. *Douglas* holds that Respondent's mere efforts to apply for the desired position while the standard was in effect and within the limitations period were sufficient to establish a "continuing violation" and thus to make timely Respondent's time-barred claim based on the March 1, 1996 express denial of employment. *Douglas*, 271 F.3d at 823-24. Accordingly, the

state of the record is sufficient for this Court to decide the issues determined by the court of appeal and presented by the petition.

As for Respondent's claim that "there are factual issues to be resolved before the Petitioner can seek to bar Respondent Douglas' claims based upon the legal issue of timeliness," Petitioner cannot agree with Respondent's interpretation of the court of appeals' decision. The court of appeal's decision manifestly precludes Petitioner from re-litigating the timeliness of Respondent's claims of discrimination. Respondent does correctly quote the court of appeal as stating that "... after reviewing the facts in the light most favorable to Douglas, we conclude that he has raised material facts about whether his claim extended into 1997 and 1998, making his claims under the ADA and the Rehabilitation Act timely." However, in the preceding paragraph, the court of appeal also states that:

> [b]y reapplying in the fall of 1996 during the window for applications for hiring in 1996-1998, Douglas remained 'exposed' to CYA's discriminatory vision policy during the entire 1996-1998 period. This exposure renders his claims timely by extending the claims past the June 22, 1996 deadline for filing his ADA claim, and the July 5, 1997 deadline for filing his Rehabilitation Act claim.

Douglas, 271 F.3d at 824.

Moreover, in its concluding paragraph, the court of appeal expressly reverses "the district court's grant of summary judgment on both the Rehabilitation Act and ADA claims because we conclude that the claims were timely filed under the continuing violations doctrine." *Douglas,* 271 F.3d at 825. One cannot ignore these statements, which express the court's opinion that Respondent's claims are timely because Respondent was "exposed" to Petitioner's color vision policy

throughout 1996-1998 by re-applying for the position in the fall of 1996.

Furthermore, the court of appeal constructed an alternate holding, set forth in a footnote, which also precludes Petitioner from re-litigating the timeliness of Respondent's claims of discrimination. In its alternate holding, the court stated that "in our view, the continuing violations doctrine would apply to Douglas' claim in any case ... because we cannot say that Douglas acted unreasonably by pursuing each avenue of appeal identified to him, and by reapplying for the position." *Douglas,* 271 F.3d at 824, n.13. Thus, Respondent's interpretation of the effect of the alternate holding is also flawed.

Respondent's arguments in opposition to the petition, based on a contention that the record is insufficient and that factual issues remain to be resolved on the issue of the application of continuing violation doctrine, are without merit.

B. Tolling Under California Law

Respondent contends that this Court cannot grant the writ in this case because to do so would require it "to look to the law of the State of California regarding tolling" which does not implicate any federal issues. To the contrary, this Court can grant the writ, determine any and all federal questions properly before it, and, if necessary, remand the case for further consideration of any remaining issues in the case.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Dated: June 12, 2002

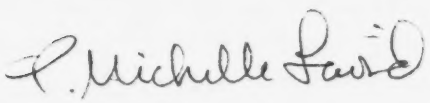
Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

PAMELA SMITH-STEWARD
Chief Assistant Attorney General

DAVID S. CHANEY
Senior Assistant Attorney General

DENNIS W. DAWSON
MIGUEL A. NERI
Supervising Deputy Attorneys General



*T. MICHELLE LAIRD
Deputy Attorney General
*Counsel of Record

Counsel for Petitioner

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